The Removal of the Consideration Requirement, and the Consequent Clarification on Duress, for Verbal Modifications to Irish Construction Contracts

By

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For the Degree of Doctor of Philosophy

Supervised by Mr Raymond Friel

Submitted to the University of Limerick, May 2014
This thesis studies the consideration requirement for verbally-made contract variations in Irish construction contracts, and proposes how this specific circumstance can be best served by the law of contract. Construction is a complex and uncertain industry; and an effective construction industry is important and necessary for Ireland: it is a key driver of a functioning, developed economy, and it requires a sustainable level of activity to maintain infrastructure and develop new assets, consistent with what is expected of a developed nation. Yet it often involves projects of financial and technical vastness; and operates in an environment of risk, contractual risk allocation and residual uncertainty. The law of contract is essentially applied in the same way by the courts, regardless of whether the transaction is one of a major or minor nature. This contract paradigm is a straightforward and rigid system, which is designed for simple contracts involving equally-met parties, conducting non-complex transactions. Construction is an industry which operates within this contract paradigm, even though construction contracts are rarely as straightforward as those envisaged by the contract paradigm. When agreeing a construction contract, parties attempt to foresee all possible risks which could occur in the transaction, even though, in the case of construction, it is often impossible to foresee all the risks. This thesis studies the nature of the construction industry in general, and the Irish industry in particular; it examines the characteristics of risk and risk allocation in construction contracts, and then, by analysing the consideration requirement for contract modifications, as well as the doctrines of promissory estoppel and duress, looks at the alternatives to contract law requirements for the presence of consideration in situations of verbal modifications to existing, properly-formed construction contracts, where fresh consideration is absent. The thesis recommends that, in order to simplify the process which exists in the Irish construction industry, the consideration requirement be removed solely from this specific circumstance, for the categories of construction activity covered by the Construction Contracts Act 2013, and provided that duress is not present.
I declare that this thesis and the work presented in it are mine alone, and have been generated by me as the result solely of my own original research. Furthermore, I confirm that parts of this work have been published as:


Signed:

[Signature]

Date: 25th May, 2014.
Acknowledgements

I offer my thanks and gratitude to my supervisor Mr Ray Friel, and to Professor Conleth Hussey, Head of Department of Civil Engineering and Materials Science, University of Limerick, for their advice, guidance and direction at key moments during this research.

I would also like to especially thank my wife, Emma, together with my parents, for their unfailing support and encouragement.
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<td>AAA</td>
<td>American Arbitration Association</td>
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<tr>
<td>ACA</td>
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<td>ACE</td>
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<td>ADR</td>
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<td>BIM</td>
<td>Building Information Modelling</td>
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<td>BPF</td>
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<td>BOQ</td>
<td>Bill of Quantities</td>
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<td>DART</td>
<td>Dublin Area Rapid Transit</td>
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<td>DB or D&amp;B</td>
<td>Design (and) Build</td>
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<td>EWCA (Civ)</td>
<td>England and Wales Court of Appeal (Civil Division)</td>
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<td>England and Wales High Court</td>
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               (International Federation of Consulting Engineers)  
               Conditions of Contract for Construction |
| FIFA         | Fédération Internationale de Football Association |
| GCCC         | Government Construction Contracts Committee |
| GC           | Government Construction |
| GDLA         | Government Departments and Local Authorities |
| GDP          | Gross Domestic Product |
| GN           | Guidance Note |
| GNP          | Gross National Product |
| HKLJ         | Hong Kong Law Journal |
| ICC          | Infrastructure Conditions of Contract |
| ICC          | International Chamber of Commerce |
| ICE          | Institution of Civil Engineers |
| ICLR         | International Construction Law Reports |
| IDA          | Industrial Development Authority |
| IChemE       | Institution of Chemical Engineers |
IEI    Institution of Engineers of Ireland (operating as Engineers Ireland)
IET    Institution of Engineering and Technology
IEHC   High Court of Ireland
IESC   Supreme Court of Ireland
IJLBE   International Journal of Law in the Built Environment
IMechE Institution of Mechanical Engineers
JBL    Journal of Business Law
JCT    Joint Contracts Tribunal
JCT SBC/05 Joint Contracts Tribunal Standard Building Contract (2005 edition)
JCT SBC/AQ Joint Contracts Tribunal Standard Building Contract, Approximate Quantities version
JCT SBC/Q Joint Contracts Tribunal Standard Building Contract, Quantities version
JCT SBC/XQ Joint Contracts Tribunal Standard Building Contract, Excluding Quantities version
JIBL   Journal of International Banking Law
Juris Rev Jurisprudence Review
KB     Law Reports, King's Bench
KGB    Komitet Gosudarstvennoy Bezopasnosti (Committee for State Security, former Soviet Union)
LA L Rev Los Angeles Law Review
LQR    Law Quarterly Review
LS     Legal Studies
MCA    Migrant Careers and Aspirations
MLR    Modern Law Review
MNC    Multi-national Corporations
MPF    Major Project Form
MTC    Measured Term Contract
NAMA   National Asset Management Agency
NDA    Nuclear Decommissioning Authority
NDP    National Development Plan
NEC, NEC3 New Engineering Contract, 3rd edition
NFC    Non-financial Corporate
NRA    National Roads Authority
NSWLR  New South Wales Law Reports
NZLR   New Zealand Law Reports
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<td>Organisation for Economic Co-operation and Development</td>
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<td>OGC</td>
<td>Office of Government Commerce</td>
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<td>OLR</td>
<td>Ontario Law Review</td>
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<td>OR</td>
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<td>Public Capital Programme</td>
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<td>RIAI</td>
<td>The Royal Institute of Architects in Ireland</td>
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<tr>
<td>RIAI SF</td>
<td>The Royal Institute of Architects in Ireland, Short Form of Contract</td>
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<td>RICS</td>
<td>Royal Institute of Chartered Surveyors</td>
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<td>TCC</td>
<td>Technology and Construction Court</td>
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1. Introduction

1.1. General

The law of contract is essentially applied the same by the courts, irrespective of whether the transaction is one of a minor nature (such as the purchase of a bottle of water at a kiosk), or a major one (such as the multi-billion Crossrail¹ construction project currently underway in South East England). This is a peculiar situation indeed, and would be even more peculiar if the law of contract could be said to be equally applicable for both of these situations.

In fact, in all likelihood, the law of contract could not possibly best serve both the minor and major contracts with the same efficiency and effectiveness. Furthermore, the two examples above do not differ simply by their magnitude, but vary hugely in their complexity. There are very few uncertainties in the purchase of a bottle of water from a kiosk, however there are myriad risks and uncertainties associated with tunnelling under London. Therefore, it could well be the case that the law of contract is appropriate, or at least, more relevant for one type of contract than another.

1.2. Context for Study

The area to be focussed upon in this thesis is the construction industry and modifications to contracts therein. The context is the Irish construction industry. Construction is a key driver of economies; through the provision of

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¹ Crossrail is a major new railway, 118 km in length, under construction in South East England, which is currently planned to open in 2018. Ten-car trains will run at frequencies of up to 24 trains per hour in each direction through the central tunnel section. The project was approved in October 2007, and the Crossrail Act received Royal Assent in July 2008. The original plan was that the first trains would run in 2017. In 2010 a Spending Review saving over £1 billion of the £15.9 billion projected cost meant that the first trains are now planned to run on the central section in 2018. It has become Europe's biggest construction project. (BBC News, http://www.bbc.co.uk/news/uk-16289051, 2nd January 2012)
infrastructure, commercial space, residential units and industrial facilities. It is an industry with long-established professional bodies, constructing essentially the same projects as the Romans, using materials which are largely unchanged in decades, and applying scientific principles which are based on the laws of physics. Furthermore, although it is an industry which operates in contractual environments, it is one which frequently is associated with major disputes.

This study is aimed at investigating the rules for enforcing verbally-made contract variations in Irish construction contracts, and establishing how this industry can be best served by this area of the law. This study is investigating the legal position surrounding such amendments, and is not proposing a new form of contract for such circumstances.

In particular, this study is interested in examining the nature of the agreement of amendments to the contract itself, as opposed to changes or variations which can be instructed through relevant clauses of the construction contract. For the purposes of clarity, the former will be referred to as “modifications” and the latter to “changes” or “variations,” depending on the language of the specific form of contract.

1.3. Development of Primary Research Question

This thesis is looking at the Irish construction industry, and the usage of construction contracts in the contemporary construction industry, and drawing from the experiences of the United Kingdom. In particular this work will focus on the consideration requirement (and consequent need for clarity regarding duress) for enforceable modifications to construction contracts in the Irish context; and specifically where those modifications take verbal form.
There is a contract paradigm: a straightforward and rigid system designed for simple contracts involving equally-met parties conducting non-complex transactions. It is a legal system designed to pick up on the simplistic contracting mechanisms of the equally-met parties in non-complex situations. Construction is an industry which exists in a legal environment of contract law and contract-related disputes, and operates within this contract paradigm, even though construction contracts are not as straightforward as those envisaged by the contract paradigm. When agreeing a contract, parties attempt to foresee all possible risks which could occur in the transaction. A difficulty with construction contracts is that it is often impossible to foresee all the risks.

The primary research question is developed by considering the inductive argument proposed by the thesis in the following terms:

Premise 1:
An efficient and effective construction industry is important and necessary for Ireland. Construction is a necessary industry. It is necessary for a functioning, developed economy, and requires a sustainable level of activity to maintain infrastructure and develop new assets, consistent with what is expected of a developed nation.

Premise 2:
Construction itself is a complex and uncertain industry. It often involves projects of financial and technical vastness; and operates in an environment of risk, risk allocation and residual uncertainty. This risk and uncertainty requires key choices to be made regarding procurement routes and contract forms.

Premise 3:
Procurement and contract choices revolve around the fundamental risk allocation of the procurement route and the contract itself, plus the ability to tailor the

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2 The rationale behind the selection of the inductive reasoning method is outlined in section 1.6 Methodology.
contract to suit the specific project requirements. There are further restrictions in this regard on public projects in Ireland which are somewhat at odds with developments in the UK, which insist on a rigid and unbalanced approach to risk allocation, and with limited opportunity to for variations post-contract.

Premise 4:
Completed construction projects are very rarely the same as what was envisaged at the outset, so mechanisms for change (often referred to as change orders or variation orders) are usually included in the conditions of contract. The level to which these permit changes as a result of the eventuation of risk events depends on the specific term of the contract, as well as industry precedent.

Premise 5:
If a change or variation is so great that it is beyond the scope of what may be instructed under the contract, it may require a modification to the contract itself.

Premise 6:
A modification to a contract requires all the formalities associated with the formation of a contract, thereby meaning that a modification, verbally-made, and without fresh consideration, may not be enforceable. Furthermore, a modification to a contract, not freely entered into, (i.e., made under duress) will not be enforceable.

Premise 7:
There are several examples of classifications of contract which are afforded some special treatment by the law, such as employment, insurance, and sale of land contracts. Aspects of the reasons why these classifications of contract are treated differently allows parallels to be drawn with the Irish construction industry.
Premise 8:
A change to the legal treatment of Irish construction contracts, for the specific instance of verbally-made modifications, where the original contract was properly-formed and the modified contract was freely entered into, would reduce the uncertainty surrounding such modifications, provided that the necessary clarification defining duress, under such circumstances, was clarified.

Conclusion of Argument:
The law should be changed accordingly for this specific circumstance in Irish construction contracts.

The question arises as to whether or not the strict rules of contract (such as being committed to a contract once freely-entered into) are fully appropriate in a construction context where the risks faced are different to those envisaged by the contract paradigm. This thesis examines how modifications to contracts are enforced; especially in situations where the strict rules of formation may not have been followed, with respect to the modification. It is in this context that consideration is examined. It is understood and accepted as being a beneficial and useful doctrine of contract law, but how relevant is it (the requirement for consideration) to situations where parties who have freely-entered into a properly-formed construction contract in Ireland, and wish to modify a contract but no consideration is provided? Certainly, in the current Irish legal framework, the enforcement of this modification becomes problematic when the consideration requirement is taken into account.

In the absence of consideration, the element of reliance must be examined. Has one party relied on a promise made without consideration, and would it now be unjust to allow the other party to negate that promise and insist upon its strict legal rights? This opens the area of promissory estoppel, and how it is applicable in such circumstances for the enforcement of promises made without consideration.
The other side of an examination of the rules of enforcement of contract modifications must investigate whether or not duress or undue influence has been applied to a party in agreeing to the modification. In particular, in this area is the emerging doctrine of economic duress, where no physical threat is made to a person or their property, but a threat could be made (or implied) against a party’s financial wellbeing. This is a bulwark against the opportunistic behaviour by the unscrupulous. A contract modification obtained under duress cannot be enforced.

The study proceeds to note that there are some contracts which have special rules which only apply to their specific class of contract. The thesis investigates the underlying reasons behind why the law treats some classifications of contract differently, and enquires as to whether or not construction contracts have any of those features.

This leads to the development of the primary research question, which is:

*Is the Irish construction industry sufficiently different as to merit some separate treatment in law, regarding the rules for contract modification, and where such modifications are verbally-made and without fresh consideration?*

1.4. Outline of Examination of Primary Research Question

In order to create the environment to examine the primary research question, a background to the construction industry and contracting in the construction industry in Ireland is first presented. This chapter examines the historical and contemporary nature of the industry in Ireland, and identifies the unique nature of construction. It shows that construction is an important industry for Ireland, and identifies some of the features of the construction industry in Ireland.
From that contextual-based chapter, the thesis then moves on to discuss a key factor of uncertainty in construction projects and the allocation of risk, and how the effects of risk allocation manifest in the various procurement and contracting arrangements which exist in construction. As a result of risk and uncertainty, as well as the procurement routes and conditions of contract, changes are a feature of construction contracts. These changes are often in the form of delays, which arise from the uncertainty inherent in construction. The context for this chapter is public and private sector construction procurement and contracting, and experience from the UK is heavily drawn upon, both because of the UK courts’ persuasive precedent in Ireland, and the UK construction industry’s functional similarity with Ireland. It is noted that construction contracts have, on one hand, an inherent risk allocation profile, as well as an ability to permit changes under the terms of the contract; and on the other hand, have the same mechanism as any contract for treating those changes which fall outside the scope of the contracts’ variation orders - hence modification to the contract itself. An examination of the circumstances surrounding the changes within the contract is first examined in order to enable an examination of the changes without the contract; the latter being the area of primary research investigation of this study.

The thesis then therefore examines issues relating to enforcement in construction contracts over two chapters: firstly consideration and promissory estoppel, which are enforcement aspects of contract law; and then the role of voluntariness versus duress, including economic duress: doctrines which are more relevant to the vitiation of contracts and contract modifications. These areas, in particular, are highly relevant to the discussion on whether the traditional rules enable or disable the enforcement of modifications in a construction context. Since the study is focussed around the consideration requirement for verbally-made modifications to construction contracts, the counterpoint to an absence of consideration, in terms of duress, is vital to this study. Duress forms the defence to enforcement of a contract modification improperly procured, and as such, is the other side of the coin of consideration in this study.
1.5. Contribution to Knowledge

The originality of this study rests in its questioning of certain aspects of legal enforceability to the construction industry. Questioning the role of consideration in contract law is not new – particularly where modifications to existing contracts are concerned, nor is a proposal to consider duress or estoppel as alternatives a novel piece of study. This thesis covers new ground insofar as it raises these questions in the context of the Irish construction industry, and questions the role of the consideration requirement for verbally-made modifications to Irish construction contracts, which were properly formed in the first place. It bases this questioning and analysis on an examination of the Irish construction industry: its features, characteristics, importance, and propensity for changes. On the basis of this, it is possible to develop, in tandem with similar work unrelated to the construction industry, a novel piece of research specifically addressing a construction industry problem in the context of the rules of contract law.

Furthermore, an important contribution to knowledge made by this study, is the clarification on duress, (and in particular, what constitutes illegitimate pressure) for this specific circumstance. This clarification progresses the understanding of how illegitimate pressure must be defined by what would a party to an Irish construction contract would reasonably be expected to bear, given the particular nature of this industry.

It is these two aspects combined, which enable this thesis to make a fundamental contribution to knowledge, by placing together a proposal to eliminate the consideration requirement for verbally-made modifications to Irish construction contracts, with the provision that duress, with a clarified understanding of what is meant by duress for this specific industry, is absent from the equation. Such a proposal represents a change from the current situation, and this thesis argues that this change is in the best interests of the parties involved, that it facilitates
commercial best practice, and yet it provides protection against unscrupulous
behaviour by the opportunistic.

### 1.6. Methodology

Legal methodology is a somewhat complex and divisive area, and although not a
widely covered area in the literature, interesting and diverging views exist. According to Rhode, “all is not well in the state of legal scholarship,” which proceeds to note that the “legal profession has no shared vision of what kinds of scholarship are most valuable or even most valued by the academy.” There have been studies, showing moves “away from traditional doctrinal analysis towards a more contextual, interdisciplinary approach,” even though the same study notes that the engagement in socio-legal studies is not a fully understood method of dealing with legal research, which itself is not yet strongly interdisciplinary. Insight is offered by Siems into the development of original legal research, which posits that the first step is to examine a “micro-legal question in some detail,” though this in itself does not necessarily result in original legal research. More is required. Siems proposes that, in addition to the examination of the micro-legal question, including aspects such as a “‘legal synthesis’ which attempts ‘to fuse the disparate elements of cases and statutes together into coherent or useful legal standards or general rules;’” an understanding of the relevant legal history; the addition of a macro-legal topic to the micro-legal analysis; a comparative aspect; an element of another academic discipline, and a

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clinical dimension of “connecting law to life” are more likely to result in the originality of the legal research.

Further interesting insight is provided by Siems and MacSithigh, which proposes the classification of legal research into the three categories: “law as a practical discipline”, “law as humanities,” and “law as social sciences.” Considering the law as a practical discipline, legal research is “about a comparatively value-free analysis of legal rules.” The second approach, law as humanities, relates to “interpretative disciplines such as history, philosophy, theology and literature.” The third and final framework, law as social sciences, “offers the opportunity to challenge the usefulness of court decisions and pieces of legislation from an external and often empirical perspective.” The subject matter of this thesis is best served by the first and third of these frameworks, through the examination of the rules of contract enforcement, and in the context of their effect on a complex industry with different actors motivated by a myriad of incentives.

Based on the foregoing, the methodological strategy selected for this study involves a combination of different methods, each deemed appropriate for their respective areas of investigation. The study begins with a contextual analysis and background analysis of the construction industry, in terms of the characteristics of the industry and the difficulties involved in risk management. This involves doctrinal research of available sources of texts, literature, industry analysis and commentary. This then leads to an enhancement of the analysis of the construction industry in terms of how the law and lawyers treat the area of risk allocation and resultant construction contract modifications, and whether or not that treatment is appropriate to that context. For this stage of the study, further desk-based investigation is carried out, this time using source materials such as judgments, articles and leading texts. Following from the above, based

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on the contextualisation and primary/secondary source material analysis, this leads to the ability to form conclusions based on an inductive reasoning approach.

Inductive reasoning is described by Bowell and Kemp\(^8\) as a method of reasoning which requires a set of premises, which, if true, provide a good reason for accepting the conclusion. For the argument to be valid, the premises must be sound, and the conclusion a logical follow-on from sound premises. Soundness, in this context, refers to whether the premises are, or can be shown to be, true or false. When contrasted with deductive reasoning, which allows certainty as to the correctness of the conclusion, inductive reasoning relies on a probabilistic approach. Bowell and Kemp refer to this as the degree of rational expectation. A person’s degree of rational expectation in a given argument, is:

“the degree to which he or she is entitled to believe it, given the evidence he or she has … [and that the] total sum of evidence makes it reasonable to expect the proposition in question to be true.” \(^9\)

An inductively forceful argument is therefore one where the probability of truth is greater than 0.5 but less than 1, or as described by Bowell and Kemp:

“The argument is not deductively valid, but if the premises are true (or were true), then, given no information about the subject-matter of the argument except that contained in the premises, it would be more reasonable to expect the conclusion to be true than it would be to expect it to be false.” \(^10\)

Inductive reasoning is appropriate for this type of study because it is impossible to make a valid deductive argument about the material at hand. A valid deductive argument would require certainty, a probability of 1, that the conclusion is


\(^9\) Ibid, at p.93.

\(^10\) Ibid, at p.95.
absolutely correct and irrefutable, based on premises which are and can be shown to be true. Such certainty is not possible in a study of this nature. This type of study therefore requires an assessment of the evidence, and then to indicate if the evidence makes it rational to believe the conclusion, without having the certainty that the argument is true. Assuming that the premises naturally lead to the conclusion, the challenge for this research is to ensure that the premises are such that they allow the conclusion to be reached. Goel et al\textsuperscript{11} note a difficulty in inductive reasoning where inductive arguments can have identical logical structures, (for example, two premises leading to a conclusion), but differ only in content. The validity of the two arguments then becomes “a function of the content of the sentence and our knowledge of the world. It is usually a matter of knowing which properties generalise in the required manner and which do not.”\textsuperscript{12} Therefore, it is not sufficient to merely show premises which are sound; the premises in the context indicated must lead to the conclusion of the argument: they must naturally follow, as indicated by Bowell and Kemp.\textsuperscript{13}

For the purposes of this study, therefore, it is proposed to systematically demonstrate that the premises outlined in section 1.3 are sound, that the conclusion is a logical follow-on from those premises, and that there is reason to have confidence in the entire argument, in terms of its greater likelihood of being true than false.

A study such as this could include quantitative data. However, given some of the shortcomings of such an approach, as described by Siems, it is felt appropriate to omit quantitative aspects from this research:


\textsuperscript{12} Ibid, at 1305.

“Yet, in social sciences one also has to face the limitations of this quantitative approach. For instance, in economics a narrow data-driven approach can be superficial, because ‘the economy is a complicated, dynamic, non-linear, high-dimensional and evolving entity,’ the whole of economics is contaminated by value judgments, and uncontrollable factors affect economic data.”

Given that construction is a complex industry, it is considered that this study should therefore focus on the legal doctrinal issues in the context of the industry. Subsequent studies may consider the usage of quantitative data more appropriate.

Where this thesis refers to the law and current affairs, it is based on what is understood to be the case as of 1st January 2014.

2. The Construction Industry in Ireland

2.1. Introduction

The primary purpose of this chapter is to introduce, explain and demonstrate that construction is an important and necessary industry for Ireland. As outlined in the previous chapter, Premise 1 of the argument of the thesis is that an efficient and effective construction industry is important and necessary for Ireland; for a functioning, developed economy, and requires a sustainable level of activity to maintain infrastructure and develop new assets, consistent with what is expected of a developed nation. Furthermore, as per Premise 3, there are aspects of the Irish construction industry which are somewhat special, especially in terms of Irish public works, which will be examined in this chapter also. In doing so, this chapter progress the thesis by establishing the necessity and importance of the construction industry in Ireland, and also introducing aspects which set the Irish construction industry apart in terms of its special characteristics. A very important issue with regards to the latter, for the purposes of this thesis, and which will be developed in later chapters, is the opening up of the possibility that Irish public works, by virtue of the relatively-recently introduced forms of contract, have particular characteristics which may require some special treatment by the law.

It is thus important to begin by defining construction, and describe the categories and classifications therein. Since the subject matter for this study is to a large extent Irish-based, an examination of the role which construction plays, and has historically played in Irish society follows. The role which contract law fulfils in construction will then be investigated. This chapter will therefore set the context for the thesis by looking at the construction industry in general; by first looking internationally, and then focussing on Ireland.
The aim of this chapter is that by illustrating both the complexity and the importance of a functioning construction industry, an environment will have been formed to enable an investigation of the contractual implications which exist in this industry; particularly relating to modifications and variations to existing contracts, properly formed. Construction projects are inherently complex temporary endeavours, with transient project teams, and invariably require changes to the original contract as the projects progress and which are often as a result of complexity.

Complexity can be considered in technical terms of what is required to be built, to what budget and timeframe; and also in terms of the unknown elements associated (to a greater or lesser degree) with each project. The temporary nature of projects is that characteristic of projects which contain an identifiable start and finish date. See PMI, A Guide to Project Management Body of Knowledge, (5th Edition, Project Management Institution 2013) for further information on project descriptions and characteristics.

The project teams (comprised of professionals such as engineers, architects, construction managers, surveyors; or technical personnel such as contractors and tradespeople), come to the site for the duration of the project, and then move to the next project. This trend is particularly evident in the contracting side of the industry. Contractors are those organisations who physically carry out the construction work and deliver a completed project to the other contracting party (the client, employer or owner) in return for consideration (usually in the form of money: the contract sum). Historically, the construction professionals (engineers, architects, etc) who worked on the client-side of the contract may not have been as transient as the contractor in the sense that they may have had established practices in a town or city which would allow them to work on projects in their catchment area, much as how a solicitor may have numerous unique clients, but have a constant base or firm headquarters.

'Client-side' is a term used to describe those construction professionals whom are employed by the client to act for the client. They are typically appointed at the pre-contract stage, and the term is used to distinguish cognate professionals at the post-contract stage. There are usually construction professionals (such as engineers, surveyors, project managers, etc) whom are also working on the project at the construction stage, but whom are in the contractor’s employ.

It is therefore a logical feature of the construction industry that South Africa was of considerable interest to construction companies leading up to the 2010 FIFA World Cup, that London has been a hive of activity in previously derelict areas of Stratford, Northeast London leading up to and beyond the 2012 Summer Olympics and Paralympics, or that attention is now moving to South America with a view to upcoming projects for both the 2016 Summer Olympics in Rio de Janeiro and the 2014 FIFA World Cup in Brazil. The shift in concentration of construction to the Middle East and Persian Gulf region is merely another example of this transience which is a key feature of the industry.

It is a feature of construction projects that in most cases, for various reasons, the completed construction project is not 100% designed at the point when construction begins on site. This will be developed further in later sections of this thesis, but is worth noting at this stage, since a primary reason for variations to construction contracts when the project is being constructed is to accommodate changes due to incomplete design at tender stage.

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result of events occurring which were not conceived of at tender stage.\textsuperscript{18} It is the transience which is both a strength and weakness of how the industry operates. An internationalised company with global operations can benefit from best practice from across the world, but can also suffer from operating within divergent local customs, cultures and legal structures, in terms of its effectiveness in delivering projects.

The construction industry is a key driver of economic activity in any developed country, comprising approximately 12\% of Gross Domestic Product\textsuperscript{19} (GDP) in the EU 15 countries.\textsuperscript{20} A vibrant construction sector is necessary on one hand to provide new transportation, water, energy and medical infrastructure; housing; educational facilities; amenities; public services; and the means for commerce to exist and a nation to generate wealth, but also, and equally vital is the role of construction in maintaining and upgrading these assets as necessary during their design lifespan.

\textsuperscript{18} Tender stage, in construction projects, refers to the stage in a project when the design documentation is released to contractors for them to make a bid to construct the work. In legal terms, it is an invitation to treat. The implications of this stage are that the successful contractor prices the work on the basis of the documentation (and hence level of knowledge of the project) at this (tender) stage. This is therefore the test for determining whether or not a contractor or employer might be in breach of their contract: if it can be determined that such information was available to the parties at tender stage.

\textsuperscript{19} DKM Economic Consultants and Goodbody Corporate Finance, Submission to the Government by the Construction Industry Council, Jobs and Infrastructure - A Plan for National Recovery, (DKM Economic Consultants and Goodbody Corporate Finance 2009), \texttt{<http://www.dkm.ie/uploads/pdf/reports/CIC\_20Submission\_20to\_20Government.pdf>} accessed 2\textsuperscript{nd} April 2013. While this is accepted as being a document produced on behalf of a lobby group, (the Construction Industry Council), the statistics referred to are considered reliable as being determined by the report’s authors. The Construction Industry Council was established in February 1991 with the objective of dealing with issues of common interest for the construction industry in relation to overall policy issues. The Council acts on the basis of consensus and all decisions and policy statements published are agreed by the member organisations. Membership of the Council consists of: The Society of Chartered Surveyors (SCS); The Royal Institute of Architects in Ireland (RIAI); Engineers Ireland; The Association of Consulting Engineers of Ireland (ACEI); The Construction Industry Federation (CIF); and The Building Materials Federation (BMF). The CIC represents approximately 43,000 members nationally.

\textsuperscript{20} EU 15 countries are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.
In the Irish case, a brief historical chronology is presented; outlining the stages of development of the construction industry from before the 1990s through to the collapse in the industry beginning in May 2007, (when the value of construction activity peaked at approximately €38 billion\(^{21}\) and is expected to be as low as €8 billion in 2013.)\(^{22}\) This gradual rise and sudden fall is important to identify in particular, because the time immediately prior to the this forms much of the rationale for the introduction of the current forms of contract in use in Irish public works in 2007.\(^{23}\) A notable feature of these newly-introduced public works contracts, which will be examined in some detail, is the severe restriction on variations once the contract is signed. This restriction on variations is at odds with construction contractual developments in the UK, as a comparator. While at first glance, the implementation of a suite of contracts which restricts variations could be viewed as being a possible solution to how construction contract law deals with variations in construction contracts by eliminating variations from the outset, in reality however, variations are often an inevitable characteristic of construction projects, which will be discussed later.

\(^{21}\) Derived from Ulster Bank Construction Purchasing Managers’ Index, monthly surveys of selected companies which provide an advance indication of what is happening in the private sector economy by tracking variables such as output, new orders, employment and prices across both manufacturing and service sectors. [http://www.ulsterbankcapitalmarkets.com/economicindicators.aspx?gid=ri&ind=19](http://www.ulsterbankcapitalmarkets.com/economicindicators.aspx?gid=ri&ind=19) accessed 2nd April 2013.

\(^{22}\) Tom Parlon, ‘Where now for the construction industry in the West/Mid-West?’ (Institution of Engineers of Ireland, Thomond/West Region, Winter Lecture Series, Ennis, 16th October 2012). Tom Parlon is the Director General of the CIF. The CIF is the national and regional representative body for construction industry employers in Ireland. It is recognised by Government and public bodies across the country as the representative body and voice of the construction industry in Ireland.

2.2. What is meant by ‘Construction’?

In order to contextualise this study, it is necessary to define the industry which is being examined. A more holistic breakdown of construction in terms of the role it plays in asset creation is provided in a subsequent section. Prior to that breakdown, a decomposition of the types of construction activity is presented, where construction is categorised in terms of the inherent characteristics of whether the work is classified as public or private; building or civil engineering.

Procurement routes in construction projects will be discussed in the next chapter, but an initial reference is required at this stage to explain some of the key distinguishing features between types of construction projects. A key determinant in procurement routes refers to where the responsibility for design lies: whether it remains with the Employer, or whether it transfers to the Contractor. This will be an important aspect of discussion in the next chapter. The classification of projects themselves has particular relevance to the options by which projects may be procured, and further implications for choice of forms of contract. This will assist in furthering the thesis by developing an understanding of how contract variations may be enforced in the different construction project types.

A most basic breakdown of construction is determined by source of funding. Broadly speaking, this is either public or private; the former being governed by

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24 Construction itself (as in the act of constructing) has been described as the ‘coordination of specialised and differentiated tasks at the site level.’ (Dubios A and Gadde L, ‘The construction industry as a loosely coupled system: implications of productivity and innovation,’ (2002) 20 Construction Management and Economics 621-631 at 632). While this thesis must begin with a description of the act of constructing, it is the construction process (contained in the construction industry) which forms the backdrop for the work carried out in this study.
EU legislation. Public refers to those projects which receive national government, local government, European or semi-state agency funding. Privately-funded projects are those projects which are funded via the private sector and using non-public finances. In the Irish context, public projects tend to be those projects constructed on behalf of local authorities, statutory authorities, government departments, state or semi-state bodies and educational or healthcare institutions, for example. Private projects tend to be those projects constructed on behalf of private-sector clients such as developers, companies, charities, religious or sports bodies, for example.

The next level of breakdown relates to the sector within the industry. The preferred sector breakdown for the purposes of this thesis is that used by Ulster Bank Construction Purchasing Managers’ Index, which decomposes the construction industry into Housing, Commercial, and Civil Engineering.

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25 Council Directive 2004/18/EEC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114. This Directive coordinates the procurement procedures relating to the purchase by contracting authorities of services, supplies and works. Specifically it governs how contracting authorities interact with interested third parties and the manner in which contracts (i.e. a requirement) must be advertised, tenders evaluated and contracts awarded. Irish contracting authorities are also subject to a series of public procurement guidelines and circulars issued by the Department of Finance which similarly lay down how a procurement process should be run. If the value of the goods or services to be procured is below the applicable value threshold, a procurement process will fall outside the ambit of the Directives, but will still be subject to the guidelines and circulars. The thresholds are currently (as of April 2013) €5,278,000 for works, €137,000 for services or supplies procured by central government authorities such as government departments, and €211,000 for services or supplies procured by other public bodies.

26 Examples of these bodies which are beneficiaries of public funding include, but are not limited to the following: Local authorities are city and county councils; statutory authorities are bodies such as Electric Ireland, Bord Gais Eireann (Gas utility); state or semi-state bodies include Coillte (forestry company), Irish Rail; educational bodies include universities and schools; and healthcare bodies are largely covered by those institutions under the auspices of the Health Service Executive.

27 This is a broad generalisation which will include exceptions. An example of such an exception is where a private developer builds an office building which is taken on lease by a public body. In this example, a building has become a de facto public building but whose construction was privately, and not publicly, funded.

Housing refers to all domestic construction. Commercial refers to offices, factories, retail and all other non-residential building (non-civil engineering work). Civil engineering refers to infrastructural work such as public works like roads, drainage, sewerage, transportation, and private works like telecommunications, wind farms and golf courses. Therefore there are six categories of construction activity: public housing, public commercial, public civil engineering, private housing, private commercial and private civil engineering. Projects, which could be described as energy, transport, drainage, sewage/water-related and other non-building infrastructure would be some of the sub-categories of civil engineering projects.

Table 1 (next page) presents the breakdown of project types and descriptors as used in this thesis.

29 Residential construction includes the construction of all building in which people may reside permanently. This includes, but is not absolutely limited to, houses, apartments, flats, residential complexes of varying description, bedsits, and other recognised forms of dwelling.

30 The distinction at this point is that building is largely above-ground work, as contrasted with civil engineering work which contains larger elements of at and/or below-ground work.

31 It is wholly acknowledged that this is a very simplistic, though necessary simplification, of the construction industry. Many other considerations result in further classification and sub-classifications, though the variables are many and the combinations impractical for this study. Such additional considerations could include, but would not be limited to, requirements for post-contract change, final cost certainty, cost constraints, client sophistication, quality standard required, programme expedition and certainty, and allocation of design and management responsibility. Were these additional considerations to be used in a further decomposition of the industry, the outcome would be too unwieldy to enable meaningful conclusions to be made. Therefore it is decided to limit the decomposition to broad and general classifications for this stage of study. Procurement routes, and in particular the role they play in the allocation of the responsibility for design risk, will be included in the discussion in the next chapter.
<table>
<thead>
<tr>
<th>Funding Source</th>
<th>Nature of Project</th>
<th>Classification</th>
<th>Alternative Classification</th>
<th>Examples of Projects</th>
<th>Examples of Clients</th>
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</thead>
<tbody>
<tr>
<td>Public</td>
<td>Housing</td>
<td>Public Housing</td>
<td>Public Residential</td>
<td>Social housing, affordable housing</td>
<td>Local Authority</td>
</tr>
<tr>
<td></td>
<td>Commercial</td>
<td>Public Commercial</td>
<td>Public Non-residential</td>
<td>Fire station, office building, industrial facility</td>
<td>Government department, agency</td>
</tr>
<tr>
<td></td>
<td>Civil Engineering</td>
<td>Public Civil Engineering</td>
<td>Public Non-residential</td>
<td>Road, railway, wastewater treatment plant</td>
<td>Roads authority, local authority</td>
</tr>
<tr>
<td>Private</td>
<td>Housing</td>
<td>Private Housing</td>
<td>Private Residential</td>
<td>Private residential scheme</td>
<td>House builder</td>
</tr>
<tr>
<td></td>
<td>Commercial</td>
<td>Private Commercial</td>
<td>Private Non-residential</td>
<td>Office building, hotel, industrial facility, retail development</td>
<td>Speculative developer company</td>
</tr>
<tr>
<td></td>
<td>Civil Engineering</td>
<td>Private Civil Engineering</td>
<td>Private Non-residential</td>
<td>Golf course, wind farm</td>
<td>Wind farm developer</td>
</tr>
</tbody>
</table>

Table 1: Construction Project Classifications based on Funding Source and Nature of Project

The noun ‘Client’ is used to describe the function carried out by the person or body responsible for instigating and funding (either directly or indirectly) the construction project. They are one party to a construction contract; the Contractor who constructs (and sometimes also designs) the project being the other. The term ‘Client’ is used interchangeably with ‘Employer’ or ‘Owner’ in this thesis where reference is made to the parties to a construction contract.

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2.3. **Subcontracting in Construction**

Due to the generally undemanding nature of building technology, with high labour intensity giving rise to low barriers to entry, the emergence of subcontracting, often labour-only, has become an essential feature of the industry worldwide.\(^{33}\) It has now become an established practice to sublet specialist works to subcontractors specialised in the respective work disciplines.\(^{34}\) Increasingly, construction projects require more elements of subcontracting. Subcontracting has been a well-established method in the past, and is further driven by “the demands for facilities that can meet the latest and foreseeable future needs of commercial activities; for safer healthier and more comfortable indoor environments; and for more sustainable buildings.”\(^ {35}\) In this respect, subcontracting can provide solutions to aspects of construction projects which are outside the capability of, and would be uneconomical for a single general contractor to undertake.\(^{36}\) Specialist subcontract work can be delivered more economically by further dividing it into works of a range of trades.\(^ {37}\) Indeed, such use of subcontractors is widespread: in the US it is estimated that 80-90% of the work of most building projects is performed by subcontractors.\(^ {38}\)

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34 W Hughes, C Gray, J Murdoch, *Specialist trade contracting - a review*, (Construction Industry Research and Information Association 1997).


This resultant level of specialism in the construction industry has extended from the provision of basic infrastructure in the early days of the Irish construction industry, to increasingly sophisticated projects, typified by the pharmaceutical and other high-tech industries. This has resulted in an increasingly extensive use of specialist subcontractors; with niche expertise and capability. The impact on the industry is the challenge posed to contractors, clients and project management teams to manage such a large, diverse and fragmented group of subcontractors.39

The effect of this feature of the construction industry, is that there are construction subcontracts. These contracts, which are great in number on any major construction project, require the same legal formalities as any contract, such as the main construction contract (i.e., the contract between the employer and the contractor), both in their formation and their variation. Consequently, the scope for contractual difficulties, such as those presented in this theses, is heightened in an industry where one main contract does not mean that there is merely one contract where problems can arise; in fact there are as many contracts as there are contractors, subcontractors and suppliers. A brief discussion on the contractual arrangements in Ireland between main contractors and subcontractors will ensue in the next chapter.

2.4. Role of Construction in Irish Society

The Irish construction industry has undergone significant changes in the last 20 years, though arguably none so significant as since the reduction in economic activity which began in 2007. Prior to the early to mid 1990s, the construction sector of society transformed Ireland into a modern Western country, through the provision of roads, railways, schools, electricity, hospitals, clean water, airports,

sewerage, courthouses, police stations, fire stations, libraries, social housing, telecommunications, and broadband connectivity.

Much of this development occurred slowly over many years, with some acceleration in activity beginning with the introduction of the first EU Structural Funds Programme in 1989, but activity began to grow dramatically in the period of the late 1990s up to 2007, when extensive investment occurred in construction. Taking residential house completions as a crude measure, that figure rose from 49,812 in 2000 to 93,419 in 2006, and total production in civil engineering over the same period trebled in value and doubled in output. The house completion figure gave Ireland the highest level of EU house completions of 22.2 per 1,000 population in 2006 (of the 17 EU countries that data was available for), as compared with the next highest which was Spain (17.1), but dropping rapidly to the third highest at 6.7 (France). By way of comparison with Ireland’s nearest neighbours, the UK, the house completion figure in that country in 2006 was 3.2 per 1,000 population. The GDP contribution from construction was approximately double what a country of Ireland’s level of development should have as a healthy level of activity. By the end of 2007 the industry had reached a value of €38.5 billion, 24% of GNP, and employed around 400,000 directly and indirectly, which was equivalent to 19% of total employment.

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40 EU Structural Funds are financial assistance programmes established to implement regional policies of the EU. Their principal aim is to reduce the regional disparities between member states in terms of wealth, income and opportunities.


The next sub-sections briefly detail the role which construction has played since the formation of the Irish Free State in 1920 to the present day (2013). The purpose of this is to outline the key stages of construction activity in the country, to demonstrate the economic and social aspects which the industry has played in the country’s development. The subsections below are grouped based on the dates of the National Development Plans, which ran from 1989 to 1993, 1994 to 1999, and 2000 to 2006. The current National Development Plan is operational from 2007 to then end of 2013.

2.4.1. The Irish Construction Industry: 1920 to 1993

During the period in Ireland’s history from the formation of the Irish Free State in 1920, construction work was largely public civil engineering (energy and transport infrastructure) and a combination of public and private commercial (industrial). Energy projects in that period are exemplified by public civil engineering works carried out by the Electricity Supply Board (ESB) and Bord na Mona’s (the Irish turf board’s) high profile projects such as Ardnacrusha (1929), pumped storage in Turlough Hill (1974), fossil-fueled electricity generating stations at Ringsend in Dublin, Marina in Cork, and Tarbert and Moneypoint, plus the peat-burning power stations in the midlands and the west of the country.\(^{44}\)

In terms of transport infrastructural assets, the mileage of railway track in use in Ireland reduced dramatically form 3,170 miles in 1920 to approximately 1,555 miles in 1985. The concentration of public civil engineering infrastructural construction activity ceased in what was seen as a virtually redundant rail system, which no longer was seen to be required to serve smaller, more remote locations. Instead, the very nature of how transportation needs changed was described in

1956 by J.C Bailie at a presentation to the Statistical and Social Inquiry Society of Ireland, given in Belfast, whereby the rationale behind the decline in rail investment was explained:

“In the case of passengers there are still train services to many places, while the bus services link every city, town, village and hamlet in the province, and those who can afford it travel by their own motor cars.”

Consequent decisions supporting J.C. Bailie’s observations were made to develop a high-quality road network in order to enhance road connectivity at the expense of further rail investment. A need therefore arose for a co-ordinated national programme of road development, which involved significant bridge building: utilising modern concrete technology on a large scale for the first time in the country. These decisions were encapsulated in such publications as the first “National Roads Needs Study” in 1976, and “The Road Plan for the 1980s” published by the Department of Local Government in 1979, which set out a ten-year plan for national road construction. A counterpoint to the decline in rural and long-distance rail investment was the development of an urban rail system in Dublin, the Dublin Area Rapid Transit (DART) light rail system, which was opened to passengers in 1984. The DART project resulted in the perceived need for growing numbers of commuters from the eastern coastline to Dublin city centre. As explained by then Minister for Transport, Patrick Cooney, in outlining the Transport Bill, 1981: Second Stage:

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[47] Bridge building is a consequence of the construction of roads involving grade separated interchanges, ie, road junctions which do not happen at the same level.

“The electrification of the Howth/Bray suburban service, which was approved by the Government in May 1979, will, on its introduction in 1983, represent a major improvement in public transport services for people on the eastern side of the city. Since the late 1960's passenger demand on the Dublin suburban rail services has been increasing—daily carryings on the Howth-Bray section have increased from about 12,500 in 1970 to 34,500 in 1980. The services are at present operated with diesel-hauled refurbished carriages which are due for replacement.”

Investment in the public civil engineering sub-category of transportation infrastructure in that period was not limited to road and rail. The Irish ports: both air and sea, began to grow in prominence through investment in their development. Dublin Airport,\(^{50}\) was commenced in 1937, and also that year the site was chosen for Shannon Airport. Cork Airport followed in 1961, and Ireland West Airport\(^{51}\) opened to traffic in 1986. The airport developments emanated from Shannon’s position as a stopover point for all transatlantic traffic, which had previously been limited to seaplanes, and which was located in Foynes, Co Limerick. Technological developments brought the necessity to expand the stopover to cater for land-planes as well as seaplanes. In October 1935, the Irish Government took a decision to initiate a survey “to find suitable bases for the operation of seaplanes and land-planes on a transatlantic service.”\(^{52}\) Major harbour development construction works took place in Cork, Drogheda, Dublin, Galway, Limerick and Rosslare. These developments were the principally a result of the necessity to cater for the changing nature of ship design and cargo handling modes.\(^{53}\)


\(^{50}\) Known as Collinstown at the time.

\(^{51}\) Formerly Knock Airport.


Upon consideration of the industrial projects constructed during this period, some major examples include the four sugar factories (which were publicly-funded), the cement works in Limerick, the fertiliser factories in Cork and Arklow, the oil refinery in Whitegate, early pharmaceutical entrants such as Pfizer in Ringaskiddy, and the alumina processing plant at Aughinish on the Shannon Estuary in 1984. Major public civil engineering works in the form of drainage projects were also predominant in this period, with such schemes such as the arterial drainage works on the catchments of the rivers Brosna, Corrib, Feale, Moy, Inny, Deal and Boyne. Mining of metals occurred, and the necessary infrastructure was put in place for lead, zinc and silver deposits in counties Galway, Tipperary and Meath. As a result of this industry, modern steel-rolling mills were established at Haulbowline Island in Cork Harbour, and also nearby, the Verolme shipbuilding dockyard produced small bulk carriers.\(^{54}\)

In order to contextualise the foregoing and to draw attention to the prevailing level of professionalism and culture within the industry (both from an Irish and an international perspective) in that period, it is useful to consider, as a case in point, the Ardnacrusha hydropower station scheme, referred to in the previous paragraphs. This was a significant project, valued at the time at IR£5 million, out of a total national budget of IR£25 million in 1925.\(^{55}\) The content of the works contract, to be delivered by the German firm, Siemens-Schukert,\(^{56}\) included the civil engineering works, involved the construction of the power station and other buildings, the 11.5 km head-race canal, the 2.25 km tail-race canal and all the associated weirs and locks. The first contract extended only to the civil works component of the scheme, with the mechanical and electrical part being covered only by a letter of intent. The formal contract for the mechanical and electrical


\(^{56}\) Now Siemens AG.
part followed some ten months later on 23rd June 1926. The finished project could be considered as a success, given that it came in within the time limit of three and a half years, which, as per the contract, provided for penalty clauses for failure to adhere to this time limit, and had a final cost overrun of IR£150,000: a 3% uplift on the contract sum.  

1989 marked the arrival of the first National Development Plan. Between 1989 and 1993 the National Development Plan (NDP) investment totalled €12.275 billion; of which €8.339 billion was Co-financed Funding by the EU and €3.672 billion was financed through Structural/Cohesion Funds.  

### 2.4.2. The Irish Construction Industry: 1994 to 2006

This public investment model of EU support continued unchanged in the period 1994-1999 with a second National Development Plan (NDP) investment programme of €16.8 billion; of which €10.4 billion and €6.92 billion were through EU Co-financing Funds and Structural/Cohesion Funds respectively. The final involvement of the EU was in the NDP of 2000-2006, where the total investment increased over threefold to €57.1 billion with EU co-financing contributions of €7.68 billion and Structural/Cohesion Funds of €3.74 billion. It is of note that although the overall NDP investment levels have increased very largely between the 1994-1999 NDP and the 2000-2006 NDP, the absolute investment by the EU remains largely unchanged; yet in relative terms has dropped from 61.8% Co-financed Investment in 1994-1999 to 13.45% Co-

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58 The Engineers Journal, (Dublin, The Institution of Engineers of Ireland 2004).


60 Ibid.
financed Investment in 2000-2006. Similarly, the Structural/Cohesion Funds as a percentage of overall investment has dropped from 41.2% in the 1994-1999 Plan to 6.55% in 2000-2006.

This injection of public investment correlates closely with the recent significant increase in construction activity which began in earnest in late 1997, and a major component of the increased construction activity was evident in the investment in public infrastructure. To exemplify this, prior to the turn of the millennium, commercial and civil engineering construction activity in Ireland was predominantly in the public sector. In 1997, of the €9.76 billion value of construction, €5.055 billion (51.8%) was in residential building. Of the remaining €4.7 billion, only €1.975 billion (20.2% of the total construction spend for that year) was in new private non-residential construction, such as industrial, commercial (including offices and retail), agricultural, tourism and worship. This meant that most of the major construction activity at that time was in roads, schools and hospitals, as well as maintenance programmes and schemes. In the period 1997 to 2001, for example, the industry more than doubled from the previously-mentioned €9.76 billion to €19.51 billion in 2001. €4.65 billion of this increase is accounted for in residential construction (a 91.9% increase), while new productive civil engineering infrastructure (roads, water services, energy, transportation, airports, telecommunications, ports and harbours) rose by 177% over the same period. By comparison, private non-residential commercial and civil engineering construction rose by 70.3% over this period. A surge in investment in public assets was underway.

Improvement and expansion of existing road, rail, sea and air transport networks formed an essential part of the development of the infrastructure needed to support the growth of the Irish economy. Major projects, including the inter-

urban motorway/dual-carriageway network, tunnels (Jack Lynch Tunnel in Cork, Dublin Port Access Tunnel), urban transportations systems (Luas in Dublin, Quality Bus Corridors), have all been made possible by significant levels of state investment, assisted by the European Union, (through instruments such as the Regional, Development, Social, Guidance and Cohesion Funds).^62

Other major infrastructural improvements have been in the area of public health, in particular in the provision of liquid and solid systems (water/wastewater treatment) and protection of the environment. These areas in particular had been driven by the requirement for compliance with European Council Directives.^63 A point of note is that the growth in public non-residential construction from 1997 has at its source the increase in EU support, and when that funding reduced in relative terms, the Irish Government continued with a commitment to invest in public infrastructure.

At the same time, investment in private projects was rising: notably in pharmaceutical and industrial projects. While investment in pharmaceutical projects and sites has been an ongoing feature in Ireland since the 1970s, it is observed that the country has secured over US$5 billion of investment over the last recent number of years from biopharmaceutical corporations, including Pfizer, Allergan, Genzyme, Gilead, Merck, Lilly and Centocor, and the majority of US pharmaceutical companies have multiple sites for both manufacturing and R&D. It is further noted Ireland continued to perform well in pharmaceutical investment. The life sciences sector, overall, was responsible for $52 billion

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^63 Such as Council Directive 91/271/EEC concerning urban wastewater treatment was adopted on 21 May 1991. Its objective is to protect the environment from the adverse effects of urban waste water discharges and discharges from certain industrial sectors (see Annex III of the Directive) and concerns the collection, treatment and discharge of: domestic waste water, mixture of waste water, and waste water from certain industrial sectors.
worth of exports in 2009,\textsuperscript{64} in the context of where the volume of production in all building and construction increased by 29.4\% between 2000 and 2007.\textsuperscript{65}

According to the OECD, the level of investment in Ireland by Foreign Direct Investment (FDI) rose from US$192 million to US$361 during the period of 1989 to 1992.\textsuperscript{66} This investment related to fixed asset investment by foreign-owned companies eligible for grant assistance by the IDA.\textsuperscript{67} Fixed asset investment includes all elements of facility establishment, including construction of facility as well as plant and equipment. It is difficult to put an exact figure on the proportion of this which could be classified as construction activity, but to take a highly-specialised pharmaceutical project as a basis, it is reasonable to conservatively assume that 25\% of the fixed asset expenditure is on directly construction-related activity.\textsuperscript{68} This percentage could be much higher where equipment, plant and fit-out represent a smaller element of total facility costs, and this could indeed be the case in many instances, since FDI covers all forms of such investors, and is not limited to high-tech manufacturing.

\begin{flushright}


\textsuperscript{67} Ibid. It is noted that these figures refer only to fixed asset investment by foreign-owned companies eligible for grant assistance by the IDA. The actual amount of FDI flowing into Ireland is likely to be larger than these figures as a result, though, as indicated by this report, the trends are likely to be the same.

\textsuperscript{68} Derived on that basis that the Pfizer OSP4 Project in Ringaskiddy in Co. Cork had a construction cost of €65 million out of a total project cost of €250 million. See Seán Clarke, Andrew Nixon and Hugh O’Dwyer, \textit{Pfizer OSP4, Ringaskiddy, Ireland}, The Arup Journal (Arup Consulting Engineers, 2003), at p.20 <http://www.arup.com/_assets/_download/download149.PDF> and RKD Architects <http://www.rkd.ie/Portfolio_Technology_OSP4PfizerRingaskiddy.php?PHPSESSID=34dde8cb942c210d30681202104ba834>, both accessed 9th April 2013.
During this period between 2000 and 2007, the number of construction professionals\(^69\) employed in Ireland rose from 6,200 in 2000 to 13,000 in 2007, while the overall number directly employed in the sector rose from 166,200 to 281,800 over the same period. The ratio of other categories of construction employees (which include managers, administrators, clerical, craft, sales, machine operatives and others) to construction professionals reduced from 27:1 in 2000 to 22:1 in 2007.\(^70\) An explanation which this data could indicate is that the industry might have been becoming more professional in its approach to the design and execution of its projects during that period, and employing more construction professionals on projects as a result. Construction workers and professionals became highly valued within the industry. This demand could not be solely met indigenously, and a level of immigration was required to meet the ever-growing demand for construction work. So much so, that by the end of 2007, migrants accounted for 17% of the total construction workforce.\(^71\)

The credit crisis which commenced in 2007 marked the peak of this period of high activity and caused the beginning of a dramatic decline in construction activity throughout the country, which is discussed in the next section.

\(^69\) Construction professionals are defined as Architects, Engineers, Surveyors and Construction Managers, in Atkin Chambers, *Hudson’s Building and Engineering Contracts*, (12th edition, London, Sweet & Maxwell 2010) at 2-002. The authors of *Hudson* note that this definition has expanded from previous editions, whereby ‘Managers’ were not included in what was then a chapter entitled ‘Architects, Engineers and Surveyors.’

\(^70\) Central Statistics Office, *Statistical Yearbook of Ireland, Chapter 13 Building and Construction* (Central Statistics Office of Ireland 2008) <http://www.cso.ie/en/media/duplicatecsomedia/newmedia/releasespublications/documents/statisticalyearbook/2008/Chapter,13,Building,and,Const...pdf> accessed 9th April 2013. See also 43, and note that this increase in construction professionals may be partially attributable to a broadening of the definition of construction professionals to include Construction Managers in addition to the more established professions of Architect, Engineer and Surveyor.

\(^71\) MCA Newsletter No. 2: *After the Boom: Migration and the Irish Construction Sector*, Trinity Immigration Initiative/Employment Research Centre, (Trinity College Dublin 2009).
2.4.3. The Irish Construction Industry: 2007 to 2013

By 2011, construction activity had reduced to less than a quarter of its peak in 2007. In 2007 the value of construction activity was in the order of €38.5 billion; in 2011 this has reduced to €8.7 billion in 2011,\textsuperscript{72} and an estimated €8 billion in 2013.\textsuperscript{73} A striking result of this reduction in construction activity is that the private sector of the construction industry has reduced its level of employment on a large scale. The industry’s workforce reduced by approximately 78,000 construction in 2009, on top of the 90,000 reduction of 2008, out of a peak total direct and indirect workforce of approximately 400,000 in 2007.\textsuperscript{74}

Projections at this stage indicate the reality that the construction industry is likely to take longer to return to growth because of the normal time lag in the industry cycle, but probably more importantly because of its dependence on the restoration of a normal credit market and having to deal with the existing market over-supply and NAMA\textsuperscript{75} related issues. A normal, functioning construction industry in a developed country such as Ireland should be approximately 12\% of medium-term

\textsuperscript{72} DKM Economic Consultants, \textit{The Construction Industry in 2012}, (produced by DKM Economic Consultants for the Society of Chartered Surveyors Ireland, Dublin, DKM Economic Consultants/SCSI 2011) at p.5,

\textsuperscript{73} Tom Parlon, ‘Where now for the construction industry in the West/Mid-West?’ (Thomond/West Region, Winter Lecture Series, Institution of Engineers of Ireland 2012). Tom Parlon is the Director General of the CIF. The CIF is the national and regional representative body for construction industry employers in Ireland. It is recognised by Government and public bodies across the country as the representative body and voice of the construction industry in Ireland.


\textsuperscript{75} NAMA, the National Asset Management Agency was established in December 2009 (National Management Asset Agency Act, No 34 of 2009) as one of a number of initiatives taken by the Irish Government to address the problems which arose in Ireland’s banking sector as the result of excessive property lending. The purpose of NAMA, as per the legislation, is \textit{inter alia}, “the acquisition from participating institutions of such eligible bank assets as is appropriate … dealing expeditiously with the assets acquired by it … and protecting or otherwise enhancing the value of those assets, in the interests of the State.” Since its establishment, the Agency has acquired loans (land and development and associated loans) with a nominal value of €74 billion from participating financial institutions. Its objective is to obtain the best achievable financial return for the State on this portfolio over an expected lifetime of up to 10 years.
GNP, according to the CIC. Studies carried out project that this optimum 12% of GNP may not be achieved until 2019 if the industry grows, from 2013, at a rate of 15% per annum, or 2024 if the growth rate is 10% per annum. The residential sector, which has reduced in output from 93,419 completions in 2006 to 10,480 in 2011, will have to deal with the significant surplus of vacant properties and unfinished housing developments, particularly outside of Dublin (notably, the media-styled “Ghost Estates”).

A report carried out by the Department of the Environment, Community and Local Government established that, at the time of the report (August 2011), there were 23,250 dwellings complete and vacant; 9,976 dwellings near completion, (e.g. units that were watertight but required fitting out or connection to services to ready them for habitation); and 9,854 dwellings at various early stages of construction activity from site clearance, construction of foundations up to wall plate level. This totals to just over 43,000 complete or incomplete vacant properties at the time of the report. It could be concluded from the report that the surplus in a lot of regions may not necessarily match the needs of buyers when they return to the market, since the proliferation

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76 DKM Economic Consultants and Goodbody Corporate Finance, Submission to the Government by the Construction Industry Council, Jobs and Infrastructure - A Plan for National Recovery, (DKM Economic Consultants and Goodbody Corporate Finance 2009), <http://www.dkm.ie/uploads/pdf/reports/CIC%20Submission%20to%20Government.pdf> accessed 2nd April 2013, at p.42. The GDP is the measure used in Europe. However, Ireland is unique in that it has significant net income flows with the rest of the world which need to be taken into account in deriving the output of the economy. Therefore, in Ireland GNP = GDP less net income flows from the rest of the world.

77 Davis Langdon Ireland, Annual Review 2012, (Dublin, Davis Langdon Ireland 2012), at p.4, “Medium Term Outlook.”


79 Department of Environment, Irish Government.


81 Department of Environment, Community & Local Government, and Housing Agency. Managing and Resolving Unfinished Housing Developments - Guidance Manual (Dublin, Irish Government 2011). This document is a synopsis of the state of the nation’s unfinished housing stock, and proposes practical measures for the resolution of unfinished developments with a particular focus on public safety issues, legislative matters, and funding.
of development in certain areas is unlikely to regain high levels of attractiveness to buyers. The issue remains of the fate of this overhang: will this surplus meet upcoming demand, or will it be necessary to construct where demand exists and remove the surplus from the market?

The Public Capital Programme (PCP) has also been hit heavily and the recent budgets\textsuperscript{82} saw significant savings coming from the reduction of the PCP. In this context it is of value to reflect back to 2008 when the PCP was circa €9 billion. The multi-annual capital envelope which was published in the 2008 budget also had allocated €9.1 billion for 2010. However, in 2010, an allocation of €6.5 billion was made, which is €2.6 billion less than what was previously budgeted for. Budget 2011 saw this multi-annual PCP extending to 2016, though at much reduced levels than previously. Direct capital expenditure was €3.94 billion in 2012; €3.37 billion in 2013; and expected to be in order of €3.25 billion in 2014, 2015 and 2016.\textsuperscript{83} These reductions impact capital spending by all Government departments.

The National Development Plan 2007 to 2013, which projected a total spend of €184 billion when launched in 2007\textsuperscript{84} was the subject of a substantial review by the Irish Government in 2011.\textsuperscript{85} The outcome of this review notes,


unsurprisingly, that “there will be a lower level of resources available for capital investment” and prioritise key areas for the reduced investment.  

Finally, one of the most notable features of the industry during the period 2007 to 2011, from an industry perspective, was the continuous reduction in construction tender prices. The Tender Price Index, maintained by the SCSI, shows that since 2007, tender prices have fallen by 31.25%, notwithstanding the increase in cost of building materials and oil, and the increased risk allocation to contractors of public works (which will be discussed in the next chapter). This drop in tender prices is likely to be a consequence of a more competitive environment in the wake of the changed economic circumstances, but the conclusion is either that contractors were earning supernormal profits prior to 2007 (which it was claimed was not the case), or that the increased risk is simply not being priced by contractors. This places further challenges on an already competitive industry, and is a logical outcome of reduced workload and surplus available resources, which, as of June 2013, has been contracting for six years, and has only begun to show some slight signs of growth in October 2013 - the first rise in


87 Tender Price Index produced by Society of Chartered Surveyors Ireland, 2012, <http://www.scsi.ie/ti2012>, accessed 3rd October 2012. The Tender Price Index is held by the SCSI to be the only independent assessment of construction tender prices in Ireland. It is compiled by the Quantity Surveying members of the Society based on actual tender returns for non-residential projects during the period in question. It is based on predominately new build projects with values in excess of € 0.5m and covers all regions of Ireland. The Index is therefore a measure of average price changes across differing project types and locations.


construction activity since May 2007. Even this growth, it must be noted, is only in some sectors, and not yet with any degree of consistency.

2.4.4. Construction and its role in asset creation

In the context of asset creation, construction can be described as one of three things. Firstly, construction can be the provision of national, regional and local infrastructure which improve standards of living, education, transport, communications and healthcare; created through public investment or a combination of public and private partnerships. Secondly, construction can be considered as the creation of private, speculative assets in a responsible manner which add value to the country as a whole, but which a capitalist, free-market state would not, nor should not, directly involve themselves in. Thirdly, construction can be activity such as building housing estates and developing assets such as hotels and office blocks in areas of low demand, using high levels of debt in a speculative manner where there is little evidence of demand to meet supply.

Upon an examination of construction expenditure prior to the 2007 collapse in Irish economic activity, it appears that Irish construction activity in that period was significantly greater than that present amongst Ireland’s international peers. Construction activity in Ireland contributed 25.1% to GNP in 2006 falling to


9.2% of GNP in 2010;\(^9^4\) as compared with 6% at the peak and 4.6% of GDP in 2010 for the average across Euroconstruct Area.\(^9^5\)

Reflecting on how investment was made in construction during this time of heightened activity, one possibility might be to divide construction expenditure into three categories:

Firstly, there are value-depleting assets, which are the non-performing speculative projects exemplified by empty retail and residential units, such as those referred to by the Department of the Environment, Community and Local Government in August 2011,\(^9^6\) or the Irish Glass Bottle Site in Dublin.\(^9^7\) However, the true value depletion of this category lies not just in the fact that significant investment has been made in this asset class, but also that there is consequently limited ability to invest in assets which are value adding. This opportunity cost, defined as ‘the highest-valued alternative foregone,’\(^9^8\) where economics is defined as ‘the science of scarcity’\(^9^9\) highlights how, with limited resources available, the cost


\(^9^5\) Euroconstruct, June 2010. <www.euroconstruct.org> Euroconstruct is the main network for construction, finance and business forecasting in Europe. It was established in 1975 by a number of specialised research institutes and consulting organisations as a study group for construction analysis and forecasting. At present (April 2013), Euroconstruct has member institutes in 19 European countries: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, and the United Kingdom. DKM Economic Consultants is the Irish member of the organisation.


\(^9^7\) The former manufacturing plant site of the Irish Glass Bottle Company, was sold for €412 million in 2006. An Irish State agency, (the Dublin Docklands Development Authority), was among the purchasers. In March 2012, the Irish Independent newspaper reported that the site now had an estimated value of €30-50 million. See <http://www.independent.ie/business/irish/412m-site-will-go-for-fraction-of-boom-price-26835236.html> accessed 2\(^{nd}\) April 2013.


associated with producing one additional unit of a certain product (or investing in certain projects) can be described as the amount of another type of product (or projects) that must be given up to make this possible.

Next, there are the value-neutral assets, which are those asset types which in themselves do not add value, but nor do they necessarily deplete value. They are the projects which were non-essential, such as those which replaced existing acceptable buildings and created new buildings, but no more value-adding, in their place. They are those assets which re-distribute existent wealth in a zero-sum fashion, but also represent the presence of the opportunity cost of investment in these value-neutral, rather than value-adding, projects.  

Finally then, there are the value-adding assets, which, in the Irish context, are those projects which actually add to the collective wealth of the Irish economy. They increase the sense of well-being; both physical and mental, they make Ireland more attractive to inward investment, they encourage people to remain in Ireland and establish their own businesses there. These assets are the schools, roads, hospitals, theatres, broadband, railways, and all the other infrastructural projects which increase the value of the national property and increase the population’s standard of living in turn. If investment in this asset class is in areas in which deficiencies would otherwise exist, they add value, which creates wealth, which proceeds to generate more value, and so the circle goes on. As an example, a recent impact assessment produced by IMPACT Division of Public Health at the University of Liverpool, examining mental well-being aspects of a city’s involvement as European Capital of Culture, assessed the impact of a

100 It is therefore possible to consider these value-neutral assets as value-depleting in that there exists the opportunity cost of investing in this asset class. What is important to note is that if an asset is not value-adding, it could be considered value-depleting.

101 University of Liverpool, Liverpool 08 European Capital of Culture: Mental Well-being Impact Assessment, (IMPACT, Division of Public Health, University of Liverpool 2007). This research evidence identified a number of potential impacts of investment in culture and the arts upon factors related to health and mental well-being; such as, for example, participation in cultural activities can lead to improved physical and mental health; and investment in the arts are found to have positive uses in mental healthcare.
wide range of cultural factors on the likelihood to promote and protect mental well-being. While the physical benefits of projects such as hospitals and roads are readily apparent, it is therefore also reasonable to conclude, based on the Liverpool study, that investment in cultural projects can also have a positive effect on the mental well-being of citizens, and that those projects types are thus value-adding. It must be noted that value-adding is a relative term, in that the value added by one project represents the opportunity cost of another value-adding project. There then arises the issue of determining which the value-adding assets to invest in, (assuming that it will be impossible to invest in all desired value-adding projects). Some form of investment appraisal is thus necessary to determine which project from a set of value-adding projects offers the greatest benefit, and should be invested in.

2.5. Project investment appraisal

The difference between how projects are assessed has always been necessarily different in terms of process and criteria (for reasons of transparency and accountability) for public and private projects in Ireland. For a public body, like the National Roads Authority (NRA) for example, to invest in a new road project such as a bypass, an appraisal process is followed, involving detailed cost/benefit analysis, comparing the costs of doing nothing with the costs of the various options available, and examining the relative benefits of each option. A decision is then made on the optimal way to spend exchequer money. The NRA process\textsuperscript{102} to develop that example, involves conducting cost-benefit analysis (CBA) at four phases on a road construction project process: (i) route selection; (ii) design; (iii) advance works and construction document preparation, tender and award; and (iv) handover, review and closeout. At each stage, different

parameters are entered into the calculations. For example, at route selection stage, the key determinants are the traffic composition and accident rates. At the subsequent design stage, the CBA must be run at least six times, one for each combination of traffic growth scenario (i.e., low, medium and high), and cost estimates. If tolling is to be used on the proposed road, separate tolled and untolled scenarios should also be presented, according to this process. The final stage then uses actual scheme costs and post-opening traffic flows, as compared with the forecasts, in order to determine how they affect the overall economics of the scheme, and, by using the same parameters used at the design stage, can help identify issues relating to the assessment process itself.

While no process can assure consistently good outcomes, the purpose of the NRA’s CBA is to form just one element of the appraisal process for road infrastructure projects, but it does aim to assist in comparing different projects in terms of their economic viability and, assuming that consistency of approach is rigorously followed, can allow the finitely-resourced Government to prioritise those projects which offer the best potential return in terms of value. Within this process monetary values, such as toll revenue, are readily determinable. Modelling of traffic numbers together with a rate for users to pay gives a clear projection of revenue stream. What is less clear are the more intangible aspects, such as the increase in standard of living to road users. In order to establish a monetary value for the benefit of a new road, the cost of the fatalities and injuries of not investing in the project is often used as a mechanism for putting a monetary value against the benefit. One such instance is in the UK, where the Department for Transport generates average values for the prevention of road accidents. In 2008, for example, it set the average value of prevention per road traffic casualty at £1,683,810 for a fatality, £189,200 for a serious injury and £14,590 for a slight injury.

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103 How these are derived is explained in detail on DfT’s website at <www.dft.gov.uk> accessed 9th April 2013.
A privately-funded developer, on the other hand, is not required by the State to exercise such rigorous cost-benefit processes. On one hand, the State must exercise full due diligence when spending and risking taxpayers’ money; while a developer has a greater opportunity to base decision-making on experience and methodologies deemed suitable for a given project. A view that the private sector should therefore be a more careful investor when it is their own money at stake should thus also hold true, since the key difference being that a private developer is not encumbered with a requirement to carry out cost-benefit analyses in accordance with specified methodologies, but rather can assess projects in the manner in which they and their funders feel is most appropriate for the type of project and the risk profile contained therein. It could be claimed that the private sector construction developers and investors indeed did not exercise much degree of caution in investing in some of the value-depleting and value-neutral assets referred to in the previous paragraphs. This may not have been simply down to inappropriate risk-profiling and decision-making by the developers alone. It is noted above that the private sector’s funders also played a part in deciding whether or not to invest, and therefore, while the private sector investment system required both developer and investor to approve projects, it may not have been the case that the developers’ appraisal systems were entirely dysfunctional. It is therefore possible that some of the responsibility for inappropriate risk decisions lay with the funders: a point which is addressed by O’Sullivan on financial regulation and the Irish banking crisis:

“Banks had discretion to expand their operations with little regulatory oversight. They applied this freedom to exercise a profit maximisation approach by ramping up their credit outflows. The majority of this expansion was property related, either through the financing of commercial developments or by the provision of mortgage credit to the personal sector. Banks funded this lending through

\[104\] Such as Department of Transport, *Guidelines on a Common Appraisal Framework for Transport Projects and Programmes*, (Irish Government 2009), which forms the basis for the NRA Project Appraisal Guidelines referred to previously in this section.
disproportionately high borrowing from the ECB, as their deposit accounts could not keep pace with the huge growth in lending.”

2.6. Special Characteristics of the Irish Construction Industry

The Irish construction industry differs from that of other countries, and in particular, the UK in many respects. However, with regard to this thesis, there are two primary aspects worthy of consideration, at this point in the thesis, relating to the special characteristics of the Irish construction industry. The first is the obligatory use of specific contracts for public works, which will be discussed in more detail in the next chapter, where a fuller analysis of the risk allocation implications of these contract will be carried out. The point to raise at this stage of the thesis, is that these contracts, which were introduced by the Irish Government in 2007, must be used on all public projects. This is a development for the industry which sets it apart from the UK construction industry, in that the UK industry does not require public works to be carried out under a specific form or forms of contract. A notable feature of this development in Ireland is that the public works environment has been radically re-shaped since the introduction of these contracts, of which the introduction was obligatory; the prior consultation with industry bodies was limited; the inherent contractual risk profile is weighted towards the contractor; and the scope for changes post-contract is heavily restricted.

Furthermore, this development, has, by the nature of the options open to contracting authorities in choosing which contract to use, limited that choice to a design/bid/build (“traditional”) form of contract, and a “design and build” form.


106 With some exceptions, as will be discussed in more depth in Chapter 3.
This imposition has meant that alternative procurement methods\textsuperscript{107} very rarely occur on Irish construction projects, since they cannot occur on public works, and their prevalence on private projects is naturally low in any event. As will be seen later in the thesis, this development to impose specific contracts on public works projects in Ireland is very different to the collaborative contractual arrangements which have developed in the UK industry, where in particular, with regard to public works, the element of choice of procurement route and contract form is at the discretion of the contracting authority.

The second difference which the Irish construction industry has, relative to the UK industry, in terms of relevance to this thesis, is in the nature of the construction activity itself. In Ireland, as mentioned previously, residential construction constitutes a sizeable proportion of all construction activity, but what is particularly important for the direction of this thesis is the fact that much of this residential construction is, what is referred to as, one-off housing. This is the preponderance towards the construction of single dwellings in the countryside\textsuperscript{108}. One-off housing is a distinctly Irish phenomenon whereby up to 40\% of all new housing under construction over the past 10 years is reckoned to be such construction\textsuperscript{109}. This is a huge divergence with the UK, whereby much greater protection against this kind of low density construction in the countryside\textsuperscript{110}. Several studies indicate that the prevalence of one-off housing is much greater in Ireland than in the UK, and even note that in Northern Ireland, where the figure is much less than in the Republic of Ireland, the amount of single dwellings in the

\textsuperscript{107}Procurement methods such as management contracting or construction management, which are well-established internationally.

\textsuperscript{108}The National Trust, \textit{Rural Housing Conference}, (The National Trust 2004).


\textsuperscript{110}See The National Trust, \textit{Rural Housing Conference}, (The National Trust 2004).
The relevance of this aspect of the Irish residential construction industry relates to the fact that, for the most part, the client in one-off housing situations, are the homeowners themselves. They therefore are a less sophisticated client than a housing developer, or any other commercial client, and vitally, will often procure the construction of such houses without proper formal contracts in place. This distinguishing characteristic of the Irish construction industry will be picked up further in an analysis of the relevance of the case of Williams v Roffey Brothers and Nicholls (Contractors) Ltd, in terms of the relevance of this case to the Irish construction industry.

As will be discussed in the next chapter, construction contracts have a fundamental risk allocation profile. This is in two distinct aspects of a construction contract. The first is the inherent risk allocation contained in the conditions of the contract itself. For example, does the risk of unforeseeable ground conditions lie with the contractor or the employer? Secondly, there is the scope for changes post-contract under the variation or change clauses of the contract. For example, can the contractor be instructed to deal with unforeseen ground conditions and to be paid for his efforts? Between the two of these aspects (the inherent risk allocation, plus the ability to allocate risks through variation orders), a form of contract has a risk profile. As mentioned previously, and as will be discussed in more detail in the next chapter, the new contracts for use on Irish public works place a significant burden of risk on the contractor, and restrict the changes which can be made post-contract. Consequently, where a risk materialises, which is allocated under the contract to the contractor, and the

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employer, for reasons of commercial efficacy, wishes to relieve the contractor of the burden of having to deal with the emergent risk without extra payment, and would like to instruct a related change order, but cannot do so under the contract, the only option open is to vary the contract itself. Since the contracts themselves are silent as to how the contract is to be varied, this then requires the full legal formalities required of forming the contract in the first place. It is under such circumstances that the issue of requiring fresh consideration to verbally-made modifications to these contracts may become problematic, and may require the changes proposed by this thesis.

2.7. Conclusions

This chapter has introduced what construction is and has categorised it into suitable classifications for the purposes of this analysis. It has shown the changing environment which the Irish construction industry has been in since the foundation of the State up to 2013, illustrating the complexity and importance of a functioning construction industry to the country.

It has been shown in this chapter that the Irish construction industry has had, and continues to have, a significant role to play in the development of Irish society, and is necessary to maintain and improve the national stock of infrastructure. The historically-important stages of development occurred in a number of phases, linked quite closely with National Development Plans and funding from EU sources. It has been shown that the Irish construction industry has contracted significantly since 2007. This contraction has been, at least in part, as a result of the reduction in overall economic activity in the country; of which construction provided a considerable contribution. As a consequence of this reduced economic activity, funding for public projects has reduced greatly, and, following
from attempts to reverse the trends indicated by O’Sullivan earlier, the availability of private finance is more difficult to secure.

While precise figures of current lending for construction projects are difficult to acquire, certain conclusions may be inferred from the information which is available. A report carried out on behalf of the Central Bank of Ireland in 2007 examined the distribution of lending to Irish non-financial companies. This report compares that level of lending in June 2007 with similar data from February 1999. It categorises lending to non-financial corporates by industry, and of relevance to this thesis are the sectors of the economy described as Real Estate and Construction. The report finds that in 1999, the combined lending to the Real Estate and Construction sectors comprised 24% of the total stock of loans to Irish non-financial corporates, out of a total value of €22.75 billion worth of loans. In 2007, the combined lending to the Real Estate and Construction sectors comprised 67% of the total stock of loans to Irish non-financial corporates, out of an increased total value of €142.98 billion worth of loans in that year. The total stock of loans to Irish non-financial corporates rose by 628% over that period, with Real Estate increasing by 1898.7% in that

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115 Ibid. Based on lending figures of 15% and 9% for Real Estate and Construction respectively for 1999.

116 Ibid. Based on lending figures of 59% and 17% for Real Estate and Construction respectively for 2007.

117 Ibid. It is to be noted that this report refers, incorrectly, to an increase in 528%, which should in fact be 628%, based on the lending levels.
period and Construction by 1141.1%. If it were reasonable to conservatively assume that the contributions to total non-financial corporate lending has reverted to the percentages in 1999, then it could be shown that the levels of lending to Irish construction and real estate borrowers corporate borrowers has reduced from a level of €95.80 billion in 2007 to €88 billion in 2012. This figure is likely to be a significant underestimate of the reduction in the level of lending to sub-sectors of Irish non-financial corporates (which would include Irish construction and real estate sectors).

“[T]he aggregate NFC [non-financial corporate] debt levels can mask the underlying dynamics at sub-sectoral level. In the Irish case, developments in overall NFC indebtedness also conceal the very different trends between foreign-owned MNCs [multi-national corporations] and smaller domestic companies. The former have access to international markets and group funding and have increased indebtedness in line with the continued growth in inward direct investment. The substantial impact of MNC activity on Irish debt developments is underlined by the significant increase in funding from non-residents since 2008. Conversely, indigenous enterprises are dependent on the domestic banking system and have been deleveraging following rapid increases in indebtedness prior to the financial crisis. Consequently, Irish NFC debt is inflated by the MNC presence and by the gross reporting of intra-company positions.”


120 To support this assumption, the levels of construction activity in Ireland in 2012 (at €7.5 billion) is approximately half the level of activity evident in the industry in 1999 (see <http://www.environ.ie/en/Publications/StatisticsandRegularPublications/ConstructionIndustryStatistics/ FileDownload,18630,en.pdf> accessed 10th April 2013).

At the very least, this evidence suggests that there has been a sizeable reduction in the availability of lending to Irish companies involved in construction activity. The is further indicated by commentary from the Construction Industry Federation, which has referred to the difficulties posed by the industry due to lack of available funding.\textsuperscript{122} It is safe to conclude that the construction industry is not as well-funded as it was in 2007, and that funding is now more difficult to secure for construction projects. This reduction in available funding is symptomatic of the fact that the industry is not functioning at optimal levels expected of a county such as Ireland.

Additionally, this chapter has introduced an important special characteristic of the Irish construction industry, which is of value to this thesis regarding opening up the possibility of treating the Irish construction industry separately, which will be dealt with later in this thesis. In particular, it has raised the issue of the strict nature regarding changes to the contracts for use on Irish public works, and indicated how this may introduce situations where variations to the contracts are required; such variations requiring the full legal formalities required by the initial formation of contracts.

Finally, this chapter, by outlining the role of construction in Irish society, sets the scene for the next chapter to look at how construction is a complex and uncertain industry, where risk allocation through procurement and contract form choices, plays a key role in the impact of variations which arise.

\textsuperscript{122} Construction Industry Federation, \textit{CIF Submission to the Minster for Finance - Budgeting for Employment - Budget 2012}, (Construction Industry Federation 2011), <http://www.cif.ie/assets/files/Downloads/CIF_Submission_Budgeting_for_Employment_Budget_2012.pdf> accessed 10th April 2013. It is fully acknowledged that the CIF is a vested-interest lobby group on behalf of the construction industry, and it is to be expected that such a body would be calling on the Government to improve their members’ welfare, but notwithstanding this, much of what the CIF has claimed is not entirely inconsistent with the findings elsewhere in this thesis with respect to the decline and continued stagnation of the construction industry.
3. Exploring Risk in Construction Contracts

3.1. Introduction

Following from the previous chapter, which highlighted the nature of the construction industry in Ireland, as well as some of the specific features of that industry, the primary purpose of this chapter is to introduce, explain and demonstrate certain aspects of construction projects: that the Irish construction industry is a complex and uncertain one, operating within a legal environment of contract law. This chapter will develop upon Premise 2; that construction is an industry which often involves projects of financial and technical vastness; and operates in an environment of risk, risk allocation and residual uncertainty. This risk and uncertainty requires key choices to be made regarding contract forms. This chapter will achieve its primary objective by investigating the uncertainty of construction, and how the allocation of resultant risk informs the selection of appropriate forms of contract. It will then examine how, because of this uncertainty and risk allocation, as well as contract form choices, variations arise and are dealt with. Essentially this chapter’s purpose is to explain how and why variations occur on construction projects, by taking a risk-based approach to the analysis of characteristics of the procurement of construction projects. By showing the reasons for changes to construction contracts, the ultimate purpose of this chapter, in terms of overall thesis direction, is therefore to show why changes occur on construction projects, and to identify how some of these changes can be readily accommodated under variation clauses within contracts. This is the first step in demonstrating that changes occur which cannot be dealt with under the conditions of contract themselves, and may require modification to the actual contract. Modification to the contract is then a very different proposition to the instruction of a variation under a contract, as will be discussed in subsequent chapters.
In achieving the objective of demonstrating the necessity for variations in construction contracts, this chapter will form the environment for the thesis to move to discuss how, (in addition to and beyond standard variation clauses), construction contract variations may have enforcement issues in the absence of consideration; how promissory estoppel may be used to prevent variations made without consideration from being struck down; and also even where an enforceable variation is agreed, that it may give rise to an argument that it was achieved by duress, and hence become unenforceable.

3.2. Risk Allocation in Construction Projects

It is said that in construction, “the rewards should go to the efficient, not the lucky or the litigious.”\textsuperscript{123} Owing to the separation of functions in the industry with the commonplace procurement by a client of a contractor to build an architect-designed building, construction is “an industry which is traditionally adversarial,”\textsuperscript{124} and, as concluded by Sir Michael Latham and others,\textsuperscript{125} is one


\textsuperscript{125} Sir Michael Latham, \textit{Constructing the Team, Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry, Final Report, (The Latham Report, London, The Stationery Office 1994). This report is sub-headed as a “Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry”. It was commissioned by the Department of the Environment, and published by The Stationery Office in 1994. It is widely considered as being a major catalyst for the evolution of construction contracts, notably the New Engineering Contract suite (which will be discussed in the next chapter), towards more collaborative contractual mechanisms than were prevalent heretofore. See also John Egan, \textit{Rethinking Construction: Report of the Construction Task Force, (The Egan Report, London, The Stationery Office 1998), and John Bennett and Sarah Jayes, Trusting the Team - The Best Practice Guide to Partnering in Construction, (Centre for Strategic Studies in Construction, The University of Reading, Reading Construction Forum 1995). The Latham and Egan reports were particularly influential in reforming inefficiencies in the construction industry, and will be discussed in more depth in subsequent sections of this thesis, where their contribution to the evolution of the UK construction industry is examined.

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which costs the UK economy in terms of delays and associated wastes. In 1999, the UK Office of Government Commerce\textsuperscript{126} observed that of 66 UK government construction projects, 44 missed their completion date and exceeded their initial project duration by 63 percent.\textsuperscript{127}

It is useful to begin this section with this in mind, since much of how construction is procured and contracted is misaligned with the timely and satisfactory conclusion of projects. In this section some of these problems will be considered and analysed, including the very important consideration of risk allocation within the industry. The recent introduction of the Public Works Contracts in Ireland (which will be discussed in later sub-sections of this chapter) provide an interesting contrast to perceived best practice in this regard. In particular, these contracts limit the variations under the contract (as provided by a variation clause), and as a result restrict the possibility for the inevitable changes on a construction project as it progresses to be made. Consequently, these contracts encourage the full allocation of all risk prior to the commencement of the project: a characteristic which is not generally considered possible or practical in a construction context. This will be discussed in more depth as this chapter proceeds, but in terms of the direction of the thesis, this is in important feature of the Irish Public Works Contracts which further highlights the question over the appropriateness of the traditional rules of contracts in a construction context.

As mentioned in the previous paragraph, the nature of the construction industry is such that it largely separates the design and construction function from each

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{126} The Office of Government Commerce (OGC) was an office of the UK Treasury, responsible for improving value for money by driving up standards and capability in procurement, from commodities buying to the delivery of major capital projects, maximising the effective use of 60 per cent of Government spending and a £30 billion property estate. From June 2010, the OGC is part of the new Efficiency and Reform Group (ERG) within the UK Cabinet Office. See \url{https://www.gov.uk/government/organisations/efficiency-and-reform-group} accessed 15th April 2013 for further information on the ERG.
\end{itemize}
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other, under traditional procurement, creating the gap where differences in opinion and interpretation may arise. Much difficulty arises in construction projects through the inappropriate allocation of risk. Inappropriate allocation of risk is best explained by first outlining what is understood by appropriate allocation of risk. Leading thinkers on construction risk have concluded that risk, in whatever form it manifests, is best borne by the party in the best position to manage it. To expand on this simplistic statement, the Abrahamson Principles on risk allocation are that a party should bear risk where:

- “the risk is within that party’s control;
- the party can transfer the risk (such as by insurance, for example), and it is most economically beneficial to deal with the risk in this fashion;
- the preponderant economic benefit of controlling the risk lies with the party in question;
- to place the risk upon the party in question is in the interests of efficiency;
- if the risk eventuates, the loss falls on that party in the first instance and is not practicable, or there is no reason under the above principles, to cause expense and uncertainty by attempting to transfer to another.”

Inherent here is the concept of allocation of risk: that is, that risk must be allocated to one or other party to a construction contract. It may either happen by default, in that one party automatically and/or unknowingly retains or accepts a risk. Conversely, it may happen deliberately, whereby a conscious decision is made by one party (usually the employer, as the party who generally decides on the majority of contract details), to transfer a risk to the contractor or to accept a risk if it wishes to do so. Either way that this occurs, what is important to

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128 ‘Traditional’ in this sense, refers to the route of procurement whereby a contractor is procured for the purposes of building only. A fuller discussion on procurement methodologies follows in later sub-sections.


acknowledge that all risks in construction projects must be accounted for as being the responsibility of one or other party to the contract. The process by which the employer transfers some risks and retains others is the core subject of the Abrahamson Principles (above) which offer guidance as to which risks should be transferred and which should be retained. Since construction projects can only rarely determine all possible risks at the outset of a project, decisions must be made by the procuring body as to ascertaining what risks are determinable, what risks are residual, and which party should bear those risks.

A distinguishing feature of construction contracts as compared with other types of contracts is that each project is effectively a “once-off” and not a repeat of a previous project. Even the sequential construction of two identical buildings side-by-side will differ, if only in that the weather during both construction periods will not be identical.131 “The unique nature of construction projects often increases the complexity of a project,”132 thus making it necessary to examine that which makes each project unique, and give it due consideration to ensure that the uncertainty which arises from its uniqueness is effectively managed. This uniqueness of each construction project is recognised in The Latham Report, where the allocation of risks should be:

“A choice of allocation of risks, to be decided as appropriate to each project but then allocated to the party best able to manage, estimate and carry the risk.”133

131 The parallel construction of two virtually identical buildings side-by-side was constructed by Mayjaus Joint Venture on one building and by SKJ Joint Venture on the other. The project was what became known as the Petronas Twin Towers in Kuala Lumpur, Malaysia. There is no reported account of radical differences encountered in the construction of either tower, and the completed project was officially opened on 1st August 1999, and it remained the world’s tallest building until 2004. See Charles H Thornton, Udom Hungspruke, Leonard M Joseph, ‘Design of the world’s tallest building - Petronas Twin Towers at Kuala Lumpur City Centre,’ (1997) 6 Struct Design Tall Build 245-262.


Newey, J refers to the uniqueness of the construction industry in the following terms:

“Since the industry is so large, there are so many individuals, companies, partnerships and Authorities engaged in it, construction work has to be carried out on open sites in conditions very different from those in a factory, failures by one or more can affect all engaged in a project and work often takes substantial periods during which economic conditions can alter…” 134

Whereas Newey, J above was referring to the primary causes of construction dispute, his description characterises the features of construction which make it an industry which is, at the very least, different to other industries. What is necessary to consider in this context is not so much about the uniqueness of each project (every one of which is arguably different and unique in some fashion: however small), but whether construction contracts as a whole are so different in nature to other classes of contracts. In the next sections, an examination of the nature of risk in construction projects is carried out in order to further this point. This examination considers the peculiar nature of construction projects in terms of the complexity of foreseeing the possible risks which can occur, how they are to be managed, and the outcomes should certain risks eventuate. While this part of the thesis is not intended to form the basis for an argument that construction contracts are necessarily different to other types of contracts, it nonetheless establishes the construction industry as an industry in which the nature of risk allocation is such that it stretches the contract paradigm to its limits, and complicates what is intended by contract law to be a straightforward, equally-met transaction. Ultimately, the question to be answered by this thesis is whether or not the traditional rules for contract variation enforcement are appropriate in a construction context, and, given the nature of risk in construction projects, it is therefore the case that risk is a primary contributor to this investigation.

3.2.1 **Categories of Construction Risks**

As referred to in the foregoing, a simple and straightforward contract requires the parties to try to foresee all possible risks. Sometimes this is difficult to achieve in practice, when the complexity of the nature of the work covered by the contract is high. In project situations, where a feature of the work is its uniqueness, to whatever degree, there are almost invariably issues that arise during the project making it virtually impossible to allow for all eventualities in the contract. Construction projects experience this situation to quite a profound level, due to the unforeseen and unforeseeable nature of some of the risks which manifest. An important part of this thesis involves the examination of the nature of risk allocation in construction projects, its effect on the contract choices which are made and on subsequent variations which must be made to the contract as a consequence of some of these risks.

There are many categories of risk in projects in general; and construction projects encompass some specific types of risk. Each of these risk types, when considered at the outset of a project, can be contractually provided for to a greater or lesser degree. What is important to note is that regardless of the amount of pre-contract work conducted for the purposes of identifying and managing all risks, it is rarely the case where a construction project does not experience the eventuation of some risk which was not foreseen at the outset of the project. This section of the thesis looks at the types of risk which should be considered, and comments on the degree to which unforeseen risks may manifest and how they are contractually treated. For the purposes of analysis of the effect of risk on construction contact disputes, eight risk types are proposed, based on Pickavance: ¹³⁵

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Project planning and scheduling

Planning and scheduling of project events is at the heart of successful project management, which, by extension applies to construction projects. Detailed and correct planning and scheduling is a multi-stage, multi-level process, requiring an intrinsic understanding of the subtleties, nuances and inter-relationships between the client, design team, contractor and subcontractors. It necessitates a solid understanding of the interface boundaries between the various actors, and a comprehension of the methodologies proposed at each juncture of the project. Inherent in this process is the effective management of allocated times for activities, the sequencing and prerequisite activities, as well as strong management of float time in order to deal with unforeseen events as they may occur.

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138 ‘Float’ is a term used to relate specifically to items which are not on the critical path of a construction programme, and refers to the time by which an item would have to be delayed before it became a critical item. ‘Float’ is a byproduct of the programming process, which identifies spare time by which certain activities may be delayed before their delay affects the completion date.

139 Keith Pickavance, Delay and Disruption in Construction Contracts (4th edition, London, Sweet & Maxwell 2010) at 16-073. ‘Contingency’ is extra time which a contractor normally builds into his programme, to take account of delays caused by him, or unforeseen events for which he is, or may be held to be, contractually responsible. It exists to provide a buffer for such events so as to minimise the contractor’s exposure to liquidated and ascertained damages by allowing him the opportunity to delay items without the completion date being affected. See above note on ‘Float.’ Risks relating to project planning and scheduling can be mitigated to an extent by appropriate provisions for additional time, where possible, practicable and permissible. In order to achieve this, a provision for extension of time is a usual feature of standard forms of construction contract. This is intended to alter the date for the invocation of liquidated damages against the contractor in the event that the employer has experienced a risk for which he is responsible, or has instructed a variation. Essentially this is a provision for the benefit of the employer, since if the contractor causes the delay or experiences a risk for which he is responsible, no extension of time would be permitted and liquidated damages would be applied from the original date of practical or substantial completion. So the standard forms of contract therefore provide to allow the employer to make changes it wishes on projects, and enable it to move the completion date accordingly, and without penalty to him. The opposite is not the case, and any contractor who through its own action or inaction fails to complete a project on time is liable to pay liquidated damages for the delay suffered by the employer.
• **Legal (including Political)**

The types of legal risk encountered on construction projects will vary, but can be broadly categorised into two types. The first of these are those risks which occur should an unexpected change in the law happen (referred to as political risks), which may affect employment law, methods of construction, materials used, or some such matter relating to fire egress or disability access, for example. Such risks are generally covered by the *force majeure* clauses of the standard forms of contract, and are dealt with accordingly. *Force majeure* provisions in construction contracts are not risks which may be readily mitigated against, and are sometimes considered by specific forms of contracts as shared risk events. For instance, the FIDIC Red Book contains a detailed *force majeure* clause, which defines shared risk events not as those which are unforeseeable, but instead as those risks which are “exceptional.”

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141 *Fédération Internationale des Ingénieurs-Conseils* (International Federation of Consulting Engineers), *Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer* (*The Red Book*, FIDIC 1999), at Clause 19. This clause gives examples of *force majeure* events, which could include, but would not be limited to events such as war, hostilities, invasion, act of foreign enemies, rebellion, terrorism, revolution, insurrection, military or usurped power, civil war, riot, commotion, disorder, strike or lockout by persons other than the contractor’s personnel, munitions of war, explosive materials, ionising radiation or contamination by radio-activity, natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.

142 Ibid, at Clause 19.1. Under this form of contract, a force majeure event or circumstance can be described as one:

i) which is beyond a Party’s control,

ii) which such Party could not reasonably have provided against before entering into the Contract,

iii) which, having arisen, such Party could not reasonably have avoided or overcome, and

iv) which is not substantially attributable to the other Party.

If the above four criteria are all satisfied, which a sudden legislative change may, in certain circumstances, be deemed to do, the event is considered a shared risk event, where the additional costs are shared between the parties. In circumstances where this may not be possible, and it becomes physically or legally impossible to perform the contract due to the change, there is a possibility that the doctrine of frustration may apply in certain circumstances to discharge the contract, excusing performance if a specified event occurs.
The second category of legal risks may arise from the courts’ interpretation of contracts, legislation and other legal obligations.\textsuperscript{143} Despite reflection on the implications of contract provisions, the full and wide interpretation which may be made of such clauses may be not fully foreseeable to those charged with drafting responsibilities:

“The interpretation of the standard forms by the courts generally creates legal authority, subject to the hierarchy of the courts.”\textsuperscript{144}

A difficulty with this arises from the reality that, although standard forms of contract are habitually used on construction projects, they are often used with modifications made by one party, usually the employer or on his behalf by his professional team.\textsuperscript{145} The general reason for changing terms of the standard forms of contract is for the client to alter the balance of risk more toward the contractor than had originally been intended by these standard conditions. A contractor will attempt to do the same for his own part, and strive to pass more risk to its own subcontractors. Specific reasons for doing so are because, as has already been referred to in a previous section, every construction project is unique in its own right, and has unique features requiring amendment to the standard forms of contract. Furthermore, amendments to standard forms will occur “to have special terms on any matters dealt with … in so far as they [the parties] wish to override or modify the Conditions [of contract].”\textsuperscript{146}


\textsuperscript{144} Ibid, at 2-069.

\textsuperscript{145} See RICS, \textit{Contracts in Use - A Survey of Building Contracts in Use during 2010}, (London, RICS 2011) at p.11, \texttt{<http://www.rics.org/Global/CONTRACTS\%20IN\%20USE_FINAL\_\%20Nov2012\_\%20Reage_081112.pdf>}, accessed 16\textsuperscript{th} April 2013. It should be noted that this survey relates primarily to building construction, which excludes civil engineering work, though a similar pattern can be assumed in civil engineering, since there is no prohibition on the amendment of clauses in construction contracts in the UK, and similar organisations are regularly involved in both building and civil engineering construction projects.

\textsuperscript{146} Stephen Furst and Vivian Ramsey (eds), \textit{Keating on Construction Contracts}, (Eight edition, London, Sweet & Maxwell 2008) at 19-025. Specifically here this text refers to modifications to the JCT \textit{Standard Building Contract} (2005 Edition), though the notion of modification and amendment to contract clauses is universal, unless prohibited under the terms of the contract itself. See Irish Public Works Contract as such an example, which will be discussed later.
This is not wholly inconsistent with the principle that risk should be borne by the party best able to manage the risk, as it enables the modification of standard forms of contract to allocate certain risk in ways not envisaged by the standard form of the contract, but which may, in fact, represent a more optimum allocation of that risk in the setting of the unique construction project. However, such repeated, varied, and often inconsistent amendments, have, to a certain degree, rendered court and arbitral decisions made relating to standard forms of construction contract questionable in terms of their universal applicability to that standard form, since they relate only to the precise conditions of a specific contract, which, while based upon a widely known and understood standard form, may in effect, be quite different conditions of contract as a result of the import of modifications, amendments, deleted clauses or additional clauses. Editing of standard forms of contract is therefore a potentially dangerous activity, since the interrelated nature of many clauses can have significant knock-on effects should modifications not be fully followed through. Furthermore, the theoretical views on the equity of risk allocation all fail to acknowledge that for many investors, and particularly single project investors, the fairness of risk allocation is less relevant than seeking to maximise protection against a potential risk. Parties who take out insurance, for instance, are not concerned with fairness, but protection. The law is equally unconcerned with fairness (with some exceptions), but instead whether legitimate contractual obligations have been fulfilled.

147 Standard forms of contract will be discussed later in this chapter.

148 Stephen Furst and Vivian Ramsey (eds), *Keating on Construction Contracts*, (Eight edition, London, Sweet & Maxwell 2008) at 19-025 caution specifically that ‘[t]he greatest care should, however, always be taken to ensure that ad hoc amendments do not have unintended consequences.’

Dispute risk is the risk of a dispute occurring, and the subsequent costs which would be incurred through the resolution of such dispute, and the risk that the final decision is unfavourable. Furthermore, even a favorable decision is likely to leave the winning party in a financially worse situation than had the dispute not arisen in the first place.

The costs of disputes can often be a multiple of the amount at issue. In the recent case of Walter Lilly and Co Ltd v. Giles Patrick Cyril Mackay, DMW Developments Ltd, where the sum at issue was ultimately found to be in the region of £2.3m, it was noted by Akenhead J in his judgment that:

“It seems that the parties have expended between about £9 million and £10 million by way of costs, which is obviously disproportionate to what is in dispute”

The case of Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd, which also became notorious for the significant costs incurred by the parties, incurred specific discussion on this by Jackson J in the closing passages of his judgment.

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150 [2012] EWHC 1773 (TCC); [2012] BLR 503 (QBD (TCC)).

151 [2012] EWHC 1773 (TCC) at 2.

152 [2008] EWHC 2220 (TCC). This case related to the rebuilding of the Wembley Stadium in west London, which took place between 2004 and 2007. It would be impossible here to disassemble this case and analyse the vast number of causes of disputes, but it is worth noting that many of the causes of dispute originated in disagreement over interpretation of variations to the original contract documents. While it would be wrong to attempt to simplify an extremely complex project and resultant dispute, it is observed that a significant portion of the dispute centred around Multiplex’s intention, (as the main contractor), to claim from Wembley National Stadium Ltd (the client) for 560 design changes. See also G Bewsey, ‘No room for manoeuvre,’ (2006) Construction Manager (CIOB, May 2006).

153 Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2008] EWHC 2220 (TCC) at 1671-73.
• *Design*

Design risks involve the completed project not being as the client had intended: therefore there is a disconnect between the design intent and the output. The ultimate goal of the design team is to ensure the building matches the current and future requirements of the organisation, which is ultimately based on the brief produced by the client.

When providing professional services to a client, the common causes of problems associated with this provision are:\(^{154}\)

- misinterpretation of the design
- incomplete design information
- misunderstanding of the responsibilities of the parties
- unclear performance criteria
- interference and change during the design and production information stage

The most frequent cause of claims in construction disputes were:

1. inadequate site investigations;
2. late start of design and/or undue limits on costs of the design;
3. attempts to complete the design through shop-drawing review; and
4. untimely design revisions without provisions for commensurate extra time and costs.\(^{155}\)

• *Buildability*

The duties of designers surrounding buildability relate to the level to which their designs are buildable in the context of ordinary standards of workmanship. In his

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summation of the 1984 case of *Equitable Debenture Assets Corp Ltd v William Moss Group Ltd*,\textsuperscript{156} Newey J stated in this matter that:

“The designer should ensure that the work can be performed by those likely to be employed to do it, in the conditions which can be foreseen, by the exercise of the care and skill ordinarily to be expected of them. If the work would demand exceptional skill, and particularly if it would have to be performed partly from scaffolding and in windy conditions, then the design will lack what the experts describe as ‘buildability’. Similarly, I think that if a design requires work to be carried out on site in such a way that those whose duty it is to supervise it and/or check that it has been done will encounter great difficulty in doing so, then the design will again be defective.”

• **Biddability**

The risk of biddability relates particularly to a contractor misinterpreting the details contained within the tender package of drawings and specifications, and then submitting a tender based on such erroneous understanding of the works requirements. Much of this uncertainty may be avoided through correct use of one of the standard methods of measurement for construction works.

The two principal methods of measurement for construction works are the Standard Method of Measurement,\textsuperscript{157} seventh edition, published in 1998 by the Royal Institute of Chartered Surveyors,\textsuperscript{158} and the Civil Engineering Standard

\textsuperscript{156} *Equitable Debenture Assets Corp Ltd v William Moss Group Ltd* (1984) 1 Const LJ 131.

\textsuperscript{157} Usually abbreviated to SMM7, and referred to as ‘SMM.’

\textsuperscript{158} The Royal Institute of Chartered Surveyors (more commonly abbreviated to ‘RICS’) is the leading professional body for surveyors, including quantity surveyors. It generally applies to surveyors working in building, rather than civil engineering (see Note 128 on the Chartered Institute of Civil Engineering Surveyors for further information on the professional body for surveyors working in the civil engineering aspects of the construction industry). It is in its capacity as representing the quantity surveying profession that the RICS publishes its Standard Method of Measurement. The RICS is associated with the Society of Chartered Surveyors of Ireland (SCSI), and has reciprocal arrangements for membership and standards. See <http://www.rics.org/ie/> and <http://www.scsi.ie> both accessed 18th April 2013 for further details on both the RICS and the SCSI respectively. SMM7 is currently being phased out with the introduction of the New Rules of Measurement, though there is currently (April 2013) no date for the release of these new rules.
Method of Measurement,\(^{159}\) fourth edition, published in 2012 by the Institution of Civil Engineers (ICE).\(^{160}\) The former method of measurement is primarily used for building projects, and in Ireland, exists in the slightly modified, but largely identical Agreed Rules for Measurement, fourth edition, published in 2009,\(^{161}\) published by the Society of Chartered Surveyors Ireland (SCSI).\(^{162}\) CESMM4 is widely used for civil engineering works rather than building works. The purpose of standardised methods of measurement is to allow all parties to have a shared, agreed and widely-accepted understanding of what an item in the bill of quantities includes for, and equally, what it does not include for.

The issue of misinterpretation of bid documents is somewhat covered by specific clauses in some of the standard conditions of contract,\(^{163}\) though there is a view that the intention of these clauses is to solve the problem of ‘‘errors’’ made by the Employer or their advisors in the original bills [of quantities], and not of the Contractor.”\(^{164}\) Mistakes and errors by the contractor, on the other hand, are not so easily remedied by standard forms of contract. These mistakes and errors can arise quite easily due to the complex nature of the pricing documents even on relatively modest projects. Generally, such mistakes by the contractor, which typically tend to be arithmetical in nature, are not rectifiable through adjustment

\(^{159}\) Usually abbreviated to CESMM4, and referred to phonetically as ‘Sez-Um.’

\(^{160}\) Other methods of measurement exist (such as the Method of Measurement for Road Works, published by the National Roads Authority, Ireland, 2009 <http://www.nra.ie/RepositoryforPublicationsInfo/file,16145,en.pdf> accessed 18\(^{th}\) April 2013), although to a large extent they follow the principles of the established methods produced by the ICE and the RICS/SCI.

\(^{161}\) Usually abbreviated to ARM4, and referred to as ‘Arm.’

\(^{162}\) See note above on the association between the RICS and the SCSI. As a result, there is much commonality between both the ARM4 and SMM7 methods of measurement.

\(^{163}\) For example, Clause 2.14 in the JCT SBC/05 and Clause 55(2) of the ICE 7\(^{th}\) edition conditions of contract

to the contract sum, and are consequently enforceable as forming part of the agreed contract documentation.

The limits to what can be included as a reasonable variation in remeasurement is established in *Henry Boot Construction v Alston Combined Cycles*. Humphrey J determined that three “rules” were applicable in this case:

“...The value of all variations ordered by the Engineer in accordance with Clause 51, shall be ascertained by the Engineer after consultation with the Contractor in accordance with the following principles.

[RULE 1]
(a) Where work is of similar character and executed under similar conditions to work priced in the Bill of Quantities it shall be valued at such rates and prices contained therein as may be applicable.

[RULE 2]
(b) Where work is not of a similar character or is not executed under similar conditions or is ordered during the Defects Correction Period the rates and prices in the Bill of Quantities shall be used as the basis for valuation so far as may be reasonable failing which a fair valuation shall be made.”

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166 [2000] BLR 247. This is an appeal on a question of law certified by Lloyd, J. It arises out of a construction contract dated 21st March 1994, and concerns the correct method of valuing variations. The contract incorporated the ICE Standard Conditions of Contract, 6th Edition. The question turns on the meaning of Clause 52(1), which covers valuation of ordered variations. The wording of the clause is as follows: “The value of all variations ordered by the Engineer in accordance with Clause 51 [Ordered Variations] shall be ascertained by the Engineer after consultation with the Contractor in accordance with the following principles. Where the work is of a similar character and executed under similar conditions to work priced in the Bill of Quantities it shall be valued at such rates and prices contained therein as may be applicable. Where work is not of a similar character or is not executed under similar conditions the rates and prices in the Bill of Quantities shall be used as the basis for valuation so far as may be reasonable failing which a fair valuation shall be made. Failing agreement between the Engineer and the Contractor as to any rate or price to be applied in the valuation of any variation the Engineer shall determine the rate or price in accordance with the foregoing principles and he shall notify the Contractor accordingly.

These rules are important in terms of establishing the basis for the formulation of valuations of variations, particularly where the character of the work is similar, and is used as the starting point for reaching a fair valuation for work which may not be exactly what was originally envisaged by the Contractor. While these rules provide good guidance in terms of how variations are valued, a question remains regarding how much of a variation can an employer order at the rates determined above, before a new rate must be ascertained. A contractor, pricing for a quantity of work, bases his price on the quantity expected to be performed. While minor variations are to be expected, it is unlikely that a Contractor’s rate per square metre for 100,000 square metres of block-wall construction is the same as his rate for 100 square metres of the same wall. Considerations such as machinery, equipment, materials storage, labour, consequential effects on programme and working plans would affect the price on one hand, and this may be offset to a certain degree by scale economies on the other hand. Equally as possible, the Contractor may have based a portion of his profit on carrying out the quantity expected at the time of tender, and to reduce those quantities significantly could have a disproportionate affect on his financial wellbeing on the project.

Conditions of contract provide some guidance in this regard. As an example, FIDIC Red Book,168 is clear on what it deems to be acceptable levels of change in quantities before the rates need to be re-determined. It begins by re-stating the rules in *Henry Boot Construction v Alston Combined Cycles:*169

“For each item of work, the appropriate rate or price for the item shall be the rate or price specified for such item in the Contract or, if there is no such item, specified for similar work … However, a new rate or price shall be appropriate for an item of work if … (b)(i) the work is instructed under Clause 13 [Variations and

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Adjustments], (ii) no rate or price is specified under the Contract for this item, and (iii) no specified rate or price is appropriate because the item of work is not of a similar character, or is not executed under similar conditions, as any item in the Contract.”

This clause then expands on the procedure for when these conditions are also not to apply:

“However, a new rate or price shall be appropriate for an item of work if … (b)(i) the measured quantity of the item is changed by more that 10% from the quantity of this item in the Bill of Quantities … (ii) this change in quantity multiplied by such specified rate for this item exceeds 0.01% of the Accepted Contract Amount (iii) this change in quantity directly changes the Cost per unit quantity of the item by more than 1%, and (iv) this item is not specified in the Contract as a ‘fixed rate item.”

It is of note that for the new rate to be deemed appropriate, all four of the preconditions specified above must be fulfilled, and that any other combination on its own will not suffice. Thus, a Contractor will be expected to honour his original agreement to carry out an item of work at the agreed rate, notwithstanding that it has changed, if the quantity is reduced by any amount up to, but not including, 10%; if the change in quantity alters the Accepted Contract Amount by any amount up to, but not including, 0.01% of the Accepted Contract Amount; or if the change in quantity directly alters the cost per unit by anything less than 1%. However, in order to place this in context, on a €100 million contract, a 0.01% change in the Accepted Contract Amount is a change of €10,000, which is a low threshold (relative to the total contract) for a new rate to be determined. Therefore, significant changes in quantities associated with major

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171 Ibid. Interestingly, the version of this form of contract used by Multilateral Development Banks provides higher thresholds to determine when a Contractor is entitled to seek a new rate for changes in actual quantities. No explanation of this is offered in the contract or by the publishers.
elements of construction projects could very easily necessitate the determination of new rates payable to the Contractor.

These rules and guidelines are of relevance to this thesis since they have a limiting effect on what the employer may order as a variation under the terms of the contract. Construction contracts, in having variation clauses, permit one party (the employer) to modify the contract unilaterally. In the interest of fairness and practicality, this power cannot be without boundary. An unscrupulous employer could hire a builder to build a wall comprised of 100 blocks, then insist that he build 10 more walls totalling 1,000 blocks and at the same rate of production and cost. Such a scenario would be inherently unfair to the contractor, as well as being a risk for which the contractor (as a tenderer) could not possibly foresee the limits of and therefore price. As a result, clauses such as Clause 12 of FIDIC172 (mentioned above) and the rules outlined in Henry Boot v Alston Combined Cycles173 provide limiting boundaries on the extent to which variations can be ordered under variation clauses, and how variation work is to be priced based on its similarity to already-priced work.

Of course, the parties are free to agree to any change to the contract, but in such circumstances the normal rules of contract law apply in terms of enforcement (presence of consideration, reliance or promissory estoppel, and the absence of duress or undue influence). What is somewhat incongruous with the reality of commercial construction projects between players who wish to conduct business together, is that clear mechanisms exist, permitting variations up to certain limits with direction on how they should be valued, yet as soon as the proposed variation goes beyond those limits, the parties must once again fulfil the normal rules of contract formation in order to create an enforceable variation. What is

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being examined in this thesis is just how relevant that requirement to once again
fulfil those rules is in situations where parties clearly intend to continue their
relationship with each other - albeit with a modified contract, yet must still
comply with the formalities required by contract law in order to make that
modification enforceable.

- **Financial**

Financial risk is defined as the “volatility of unexpected outcomes, generally the
value of assets or liabilities of interest.” The financial risk on construction
projects stems primarily from the client’s decision to invest significant sums of
money in the development of a new asset in the form of a building, road, power
station, or other piece of infrastructure, with the resultant risk that the completed
project will be worth less to it upon completion than the cost of development.

Symptoms of this class of risk include the project running over budget for reasons
either outside of his control, or for reasons due to his actions or inactions, (as
distinct from recoverable costs caused by the contractor for which liquidated or
delay damages provides at least part of the necessary financial cover).

Likewise, the contractor prices for the project, with a tender figure it believes
represents a competitive price and likely to be low enough to be accepted by the
client, but not so low as to cost it more to construct than it will receive in return
from the client. On this particular issue, a significant problem facing the Irish

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Series 2002).

175 In this context, development costs can be taken to include all design team costs, development
levies by local authorities, planning charges, accommodation works costs, construction and
commissioning costs, and any other special or miscellaneous payments relating to the design,
construction and completion of the project.
construction industry at present is the existence of below-cost tendering. This is manifested by a large number of contractors tendering below cost (abnormally-low tendering) simply in order to acquire work in a depressed market. It is believed that many contractors are tendering at up to 20% below cost to win projects, where such attempts to buy work may be in the hope of making an eventual profit through contractual claims, a feature which is at odds with studies which show that clients want the best possible value from contractors and realise that lowest-price does not necessarily achieve this. Abnormally-low tenders are defined as any bid whose price appears abnormally low and consequently may cause implementation problems. While it is not intended for this thesis to examine the economic reasons for contractors not exiting the industry and instead bidding low, studies have found that the reasons for abnormally low bids are the contractors’ desire to remain in business, inaccurate bidding, and inaccuracy of conceptual costs. The characteristics and effects of abnormally-low tender bids in construction projects are described as follows:

176 Below-cost tendering is sometimes described as ‘abnormally low tendering’. See James Golden, ‘Abnormally low tenders in public sector procurement’ (2013, London, Society of Construction Law) <http://www.scl.org.uk/files/D150-golden.pdf> accessed 23rd April 2013, and DG III, Working Group on Abnormally Low Tenders, Prevention, Detection and Elimination of Abnormally Low Tenders in the European Construction Industry (19 May 1999), which describes abnormally low tendering in the following terms: ‘A tender is assumed to be abnormally low if: [i]n the light of the client’s preliminary estimate and of all the tenders submitted, it seems to be abnormally low by not providing a margin for a normal level of profit; and [i]n relation to which the tenderer cannot explain his price on the basis of the economy of the construction method, or the technical solution chosen, or the exceptionally favourable conditions available to the tenderer, or the originality of the work proposed.’


“[A]bnormally low bids are attributed to insufficient market demand, excessive number of competitors, and unsound bid awarding methods. However, due to the time lag caused by the sell to produce characteristic of construction projects, contractors may be able to obtain rewards by cutting corners or by claims. Some contractors may even take advantage of project conditions and adopt opportunistic bidding strategies, submitting an abnormally low bid and then profiting from cutting corners or raising claims.”

Claims, in construction, refers to an application by the contractor to the employer pursuant to any relevant clause of the contract: for any additional payment, extension of time and/or damages for any alleged breach of duty by the employer or employer’s management team. Claims are common in construction projects and can happen for several reasons that can contribute to delaying a project and/or increasing its costs. In addition to extra work for the contractor as a result of omissions in the contract documents of elements of work required by the employer (either through mistake or instructed changes), claims will often result from a delay in completion, which entails increased overheads over those budgeted for by the contractor. The net result of claims can improve a contractor’s overall profit/loss situation on a project if their effect is to pay the contractor in additional ways not envisaged by the employer at the time of tender.

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•  **Construction/Variation**

Variations have been mentioned in several of the previous sub-sections leading up to this point, as being the consequences of various risks which manifest themselves. It is worth considering briefly the effect of variations as a risk category themselves, in terms of construction variations which may be required on a project. Significant construction risks will exist on any project in the form of unforeseen and unforeseeable events, some of which inevitably occur on any construction project. The outcome of any risk is a variation, of some description, to the original contract. A variation is defined as: “Any change to the scope of the works as defined by the contract documents following the creation of legal relations between principal [employer/client] and contractor with the proviso that the change was brought about through no fault of the contractor.”

Research has found that the client’s failure to issue a clear and thorough brief to the contractor is often indicated as a key source of variations on construction projects. Although it is true that changes directed by the client are usual on construction projects, they occur for many reasons, and are not always a negative aspect of construction or due to errors or omissions on the part of those involved. A client may have found a tenant for a large office building which it was building speculatively, and that tenant may require some changes to be made for their own operational reasons; or a change in planning zoning may mean that mid-way through construction a seven-storey building would now be permissible as eight-storey. Such variations must be contractually possible for both parties to accommodate within the scope of the original works contract, since such changes, and the much more trivial, ought to be included in the contract as they emerge and without the necessity to draw up a new contract agreement between the parties. Indeed, all standard forms of building and civil engineering contracts

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contain provision for such change, while some\textsuperscript{187} at the same time ensure that any change is not outside the scope of the what the contractor actually agreed to.

However, at some point, the variation is either too large to consider as a mere variation, or is outside the scope or expertise of the contractor for it to be considered under his remit. In \textit{Alexander Thorn v The Mayor and Commonality of London},\textsuperscript{188} Lord Cairns outlined where he believed this boundary to lie:

\begin{quote}
"If it is the kind of additional work contemplated by the contract, he (i.e, the contractor) must be paid for it and will be paid for it according to the prices regulated by the contract … If the additional or varied work is so peculiar, so unexpected, and so different from what any person reckoned, or calculated upon, it may not be in the contract at all, and he could either refuse to go on or claim to be paid upon a quantum meruit."\textsuperscript{189}
\end{quote}

Similarly, because the work was “wholly outside the scope of the original dredging contract,” in \textit{Blue Circle Industries v Holland Dredging Co}\textsuperscript{190} the Contractor was not expected or obliged to accept the instruction to create an artificial bird island as part of a dredging contract in Larne Lough. Here the Contractor had been instructed to construction a bird island in addition to the dredging works which it was undertaking. The original dredging contract stipulated that the spoil from the dredging works should be deposited in areas

\begin{flushleft}
\textsuperscript{187} For example, \textit{Fédération Internationale des Ingénieurs-Conseils} (International Federation of Consulting Engineers), \textit{Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (The Red Book, FIDIC 1999)}, at Clause 13.1, detail about the Employer’s right to vary, but limits the variation to, (amongst other things), “any additional work, Plant, Materials or services necessary for the Permanent Works…” Clearly, a contractor would not be obliged to agree to a variation which was deemed to be outside what was understood to mean the Permanent Works. A variation instruction to construct an additional training pitch beside a number of pitches which formed the original contract could be seen as a variation within the scope of a variation necessary for the Permanent Works, in accordance with the contract, whereas a sports clubhouse beside the sports pitches which formed the original contract could be seen to be a variation outside the scope of the original contract documents.

\textsuperscript{188} (1876) 1 AppCas 120.

\textsuperscript{189} \textit{Alexander Thorn v. The Mayor and Commonality of London} (1876) 1 AppCas 120 at 127.

\textsuperscript{190} (1987) 37 BLR 40.
\end{flushleft}
within Larne Lough, which were to be approved by the local authorities. Subsequent pressure from local residents and licensing authorities meant that this term of the contract became impossible to fulfil. The alternatives, which then became available, were to either dump the excavated spoil material at sea, or re-use the material locally and in Larne Lough to create an artificial bird sanctuary through the construction of an island with the spoil material. In his judgment, Purchas LJ noted as follows:

“Either of these two solutions was wholly outside the scope of the original dredging contract and therefore, had Holland not been willing, they could not, in my judgment, have been obliged to accept the work as a variation. This is supported by the acceptance of the tender by the order form dated 14th August 1978 in the simple terms already recited, whilst collateral negotiations were in hand for the solution to the problem of discharging the dredged material and the creation of an island. In contrast, however, in the case of the Island Creation Contract the official order form contains in considerable detail aspects of the contract under confirmation. In my judgment, Mr Joseph's submission that the Island Contract is separate from the Dredging Contract is correct.”

The conclusion to such situations is that contractors may claim that such variations fall outside of the variations clause of the contract, and that payment should either be made on a *quantum meruit* basis, or be deemed outside the scope of the original contract and requiring a new agreement:

“In considering whether a particular turn of events comes within clause 51 of the [Institution of Civil Engineers] General Conditions as a variation, as Mr Joseph [for the plaintiff] correctly submitted, the question must be posed: “Could the


192 See John Uff, *Construction Law* (10th Edition, London, Sweet & Maxwell 2009) at p.166. *Quantum merit* (translation: what it is worth) is a method of calculating payment owing on the basis of paying a reasonable amount for the work done. It generally arises where no price is stated in the contract for work carried out. A difficulty, noted by Uff, is in determining in what circumstances the contractor is entitled for payment be made on a *quantum meruit* basis, since to pay on such a basis is because the contract has changed so much that the work was outside the scope (and hence not included) in the original contract. See also Richard Wilmot-Smith, *Construction Contracts - Law and Practice* (Second edition, Oxon, Oxford University Press 2010) at Chapter 3.
employer have ordered the work required by it against the wishes of the contractor as a variation under clause 51?” If the answer is no – then the agreement under which such work is carried out cannot constitute a variation but must be a separate agreement.”

Such situations, as noted above, are clear examples of where a modification to the contract itself is necessary should the parties wish to include the proposed change to the works into the contract. As will be discussed in the next chapters, to agree such modifications once again requires all the formalities associated with forming a contract in the first place.

Weather is another particularly difficult construction risk for contractors and clients alike. Construction projects are usually executed in an outdoor environment, and therefore are affected by various weather conditions. Weather conditions which are likely to detrimentally affect construction projects in the British Isles are predominately wet weather, cold weather and wind speed. Rainfall causes many difficulties on construction projects from water ingress, to saturation of materials, to prevention or delay of drying of materials. However badly building works may suffer from difficulties due to rainfall, civil engineering works often fare much worse in this regard, due to the preponderance of earthworks activity prevalent in most large-scale civil engineering works.

Cold weather effects such projects in a number of ways. Firstly, certain


195 The term “British Isles” in this context used to describe the United Kingdom and the island of Ireland. It is a purely geographical term for the purposes of referring to weather phenomena which are common to the countries in that area. See Oxford Dictionaries website, where the British Isles are defined as “a group of islands lying off the coast of NW Europe, from which they are separated by the North Sea and the English Channel. They include Britain, Ireland, the Isle of Man, the Hebrides, the Orkney Islands, the Shetland Islands, the Scilly Isles, and the Channel Islands,” <http://oxforddictionaries.com/definition/english/British%2BIsles> accessed 1st May 2013.

materials require specific temperatures to be placed. For example, concrete should not be placed into supporting formwork if the temperature is below certain temperatures in order to prevent damage by freezing, or delayed curing (drying, strengthening, hardening). Cold weather can also cause frost heave to certain materials, and it can become unsafe to work due to dangers such ice, causing slippages and falls to personnel, or personnel being struck by ice falling from roofs, and so on. Wind speed is particularly problematic on building works, and unsurprisingly more so on tall buildings, (which are susceptible to wind speeds since the force exerted by wind increases exponentially as the speed increases) but wind also affects coastal and offshore construction activity.

For a contractor to get relief from a weather event, there must be provision in the contract to that effect. Most standard conditions make reference to “exceptionally adverse weather conditions” or something similar. However, what determines whether a weather event is in fact exceptionally adverse, and hence offers relief, is outlined as follows:

“For a weather delay to be excusable, the contractor must be able to show, in accordance with the terms of the contract, that the actual weather experienced during the project was exceptionally adverse. That is, exceptionally more adverse than could have been contemplated. Generally, the contractor will not be able to make a claim for the effects of “normal” weather. For instance, cold weather and some snow are to be expected in winter and more rain in spring and autumn than in the summer.”

Thus, weather must be interpreted according to the time of year and the timing of the project as anticipated by the contract documents at the time of tendering. On


198 See, for example, Ashan Kareem and Tracy Kijewski, ‘Mitigation of motions on tall buildings with specific examples of recent applications’ (1999) 2 Wind and Structures 201-251.

the face of it, whether a weather event entitles a Contractor to an extension of time may be a relatively straightforward matter, though this is not always the case, and caution is urged against over-simplification of the effects of weather-related risks.\textsuperscript{200}

- **In Summary**

Construction has been described as an industry where those involved in project delivery are “continually faced with a variety of situations involving many unknown, unexpected, frequently undesirable and often unpredictable factors.”\textsuperscript{201}

In the preceding sections the various categories of risk which are present on construction projects have been outlined. These risks do not always disappear or reduce of their own accord; instead they must be dealt with in a satisfactory way to bring them to a tolerable level: “No construction project is free of risk. Risk can be managed, minimised, shared, transferred or accepted. It cannot be ignored.”\textsuperscript{202} In order to successfully manage risks on construction projects, a primary methods of doing so is the allocation of risks between the parties.\textsuperscript{203}

\textsuperscript{200} While it is not the intention of this thesis to examine every possible source of and problem relating to delays, it is worth noting that this situation can become much more complicated in circumstances where weather plays a major role in the planning and scheduling of a project. For example, a major highways project, which involves large quantities of excavation and placing of earthworks materials will involve working with such material in seasons from approximately March to October. A typical problem centres around delays caused by a combination of events which were at the the risk of both the Contractor and the Employer, which cause the Contractor to require an additional month to complete the earthworks, but because he has scheduled to complete in October, now means that this activity will not be completed until April. That the additional period of work is one month is not in dispute; but the entitlement of the Contractor to prolongation costs of up to five months is. A problem such as this would need a forensic analysis of the causes of delays giving rise to the total delay, and an analysis of the programme in order to establish whose delays affected the critical path and how any float time was used. As mentioned, it is not the intention to examine problems such as this in depth, but it is felt necessary to draw attention to such problems so as to highlight the importance of weather in variations.


What has been presented in the foregoing is an outline of the complexity of the risks which construction projects experience. This web of risks: their interconnectivity and consequential effects, all require detailed consideration at the commencement of the project in order to allocate effectively and correctly. Failure to do so, together with the resultant eventuation of risks raise difficulties for their management because, if variations to the contract are required because of the risks occurring, the traditional rules of contract enforcement apply to construction (as with most other) contracts. The industry has adopted varying methods of project delivery in order to try to cope with differing degrees of residual risk; and the next section examines the role of procurement routes as a risk allocation method on construction projects.

Most crucially, for the development of this thesis, the foregoing has highlighted that changes will almost invariably occur on construction contract, but that the ability for all changes to be instructed under the contract is limited. Under such circumstances where the change cannot be instructed, then it becomes necessary to agree a variation to the contract. Agreeing such variations requires that all the formalities of contract formation are met once again, despite the fact that both parties may wish to continue their commercial arrangement, and, as far as the parties are concerned in practical terms, the change to be covered under a contract variation is little different to a change instructed under a variation order.

3.3 Principal Construction Procurement Routes

As mentioned in previous sections, the allocation of risks on a construction project is a key decision to be made. An understanding of the risks, such as those referred to in the immediately preceding section is necessary for this thesis to investigate in order to demonstrate the complexity and uncertainty which is prevalent in construction projects. In order to examine how this risk is then managed through construction contracts, it is necessary to consider the various
procurement routes which result in a construction contract ultimately being agreed. This progresses the thesis by further establishing the risk profile of construction projects in general, and investigating how the legal environment and consequent forms of contract are established to attempt to ensure that value for money and appropriate levels of risk transfer are achieved between the contractor and the employer. Yet, notwithstanding all of these efforts, it is noted that in standard forms of construction contract, there is invariably some degree of residual risk unaccounted for or allocated between the parties, which must be dealt with via variation clause provisions.

The law of Ireland provides a very wide measure of freedom of contract so that parties are generally free to choose their own terms. Although this is the case, in practice, parties to an agreement rarely have either the desire or the ability to work out all the terms which are required to govern their construction contract, and as a result, standard forms are most widely used. Studies carried out in the UK indicate that bespoke forms of construction contract are used as infrequently as on less than 10% of construction projects. The need for a standard form of building contract became apparent in the 19th century, in view of the complexity of rights and liabilities in building projects, and to avoid the expense and hazard of special, bespoke contracts.

In the construction industry therefore, contracts almost invariably contain a set of standard conditions, but in addition many other contractual provisions must be specifically formulated. The works to be carried out will usually be shown on drawings and described in a bill of quantities (BOQ) or specification, employer’s

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requirements, performance requirements and output. Other matters, such as contract price and the time which the work is to be carried out, will be agreed between the parties, or may be included in the tender requirements. In its final, legal form, a construction contract usually consists of a combination of standard conditions and specially prepared provisions.

The reasons for the widespread use of standard conditions of contract in the construction industry is described by Sweet:

“First, they provide a consensus as to allocating risks and responsibilities, remedies, and administrative practices. Secondly, they make the negotiation process more efficient and less costly. Finally, they can provide useful connectors between the different entities that must act together to accomplish the objectives of the parties to a construction project … Standard contracts do not eliminate the need for individual bargaining over variable terms, such as scope of services, time, and compensation. Nevertheless, the complexity of the construction project requires many additional terms, which a good standard contract provides … Also, a standardised contract that is accepted in the industry makes performance more efficient. Familiarity makes compliance easier. Clearly, those who plan construction transactions benefit greatly from standardised contracts … Standard construction contracts provide generally accepted rules that facilitate performance and do so with minimal expense. To be sure, standardised contracts can be used improperly, but this does not deny their undoubted utility as invaluable ‘connectors’ between participants.”

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208 Exceptions to this generalisation (which will be discussed in subsequent sections with regard to the Irish Public Works Contract) are those forms of contracts where amendments or modifications to standard terms of contracts are not permitted.

As to the uniqueness of construction contracts, Heal\textsuperscript{210} claims that while construction projects may be unique in their own right, construction contracts are more correctly described as a classification of contracts, and are not in themselves conceptually unique. Therefore, the general rules of contract formation apply, together with usual rules of contract interpretation; normally taking the form of standard conditions with project-specific provisions to tailor the contract to the individual and unique project. This point will be developed later in the thesis when the question of whether or not construction contracts are sufficiently different from other types of contract as to merit separate treatment, but for now it can be stated that, although construction projects have an undoubted uniqueness, the contracts themselves and the methods of procurement, (which will be discussed below), are not atypical of manufacturing contracts in different industries: a principal difference with construction being that its manufacturing is largely carried out in-situ rather than in a factory environment.

It is proposed in this thesis that construction is a type of manufacturing, and one which has unique features distinguishing it from “pure” manufacturing thus possibly requiring some, though not much, special treatment for the purposes of dealing with variations to existing contracts.\textsuperscript{211}

A feature of a combination of standard conditions and specially prepared provisions then is that the resultant contract is rarely identical to that used on previous projects,\textsuperscript{212} and as a result, decisions based on a standard form may not be suitable.


\textsuperscript{211} Although even this point about construction being in-situ is not strictly true, since much construction takes place in a factory environment for elements such as precast concrete, steelwork, drainage components, and even full off-site manufacturing of bathroom pods and apartment units. To take this to its extreme, and depending very much on the type of project, construction can become an on-site assembly operation with ancillary construction works as opposed to the primary function of constructing on-site. However, this does raise the interesting question, as to when does construction stop being construction and become manufacturing? And if large elements of what is understood to be construction can so readily be carried out off-site in a factory environment, can construction possibly be considered to be so different an industry to manufacturing, or is it merely a sub-category of manufacturing?

\textsuperscript{212} As referred to briefly in subsection 3.2.1.
have universal application to that form of contract. Furthermore, it should be noted that since many parts of the standard forms are interdependent,\(^{213}\) to alter a provision in one clause but not in another upon which it depends is likely to produce ambiguities and may defeat the objective of the alteration:

“The problem in using standard form contracts is that they leave open many areas where error can occur particularly if lay individuals prepare them, ie, those not experienced in the nuances of construction contracting. Thus, with the large number of standard forms of contract which are in use, many time the parties will attempt to amend these standard forms and do so incorrectly or the parties will fill in the blanks incorrect thus leading to disastrous results during the construction process or in any attempt to resolve a dispute that may arise due to some inconsistency in the now modified contract as when one contract incorporates by reference a standard form along with particular conditions - a situation which creates problems where none should have ever existed.”\(^{214}\)

Lord Hoffman, in *Investors Compensation Scheme v West Bromwich Building Society*\(^{215}\) provides a helpful restatement of the rules relating to the interpretation of contracts; one of which it is useful to refer to in this context. While it is the case that: “[i]nterpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract,”\(^{216}\) such interpretation can only apply to what is established as being the words of the contract. Where

\(^{213}\) An example of the interdependency of clauses is evident in the *Fédération Internationale des Ingénieurs-Conseils* (International Federation of Consulting Engineers), ‘Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer’ (1999, Geneva, FIDIC) (*The Red Book*). Clause 8.4 refers to the procedure for a Contractor to become entitled to an extension of time for completion of the works. This clause, which is the only clause specifically dedicated to that purpose, requires that in order to successfully claim for an extension of time, a Contractor must follow the procedure outlined in Clause 8.4 which explicitly necessitates application of Clauses 20.1, 10.1, 13.3; and implicitly necessitates application of Clauses 8.5, 19.1 and 19.4.


the words have been altered from their standard form, the interpretation will apply as described by Lord Hoffman.²¹⁷ Where words have been removed, such as, for example, the deletion of a clause, the interpretation cannot apply, and difficulty arises. Those who alter terms of standard contracts should therefore be aware that to do so can alter their interpretation, because interpretation is not only inherently contextual; it is constructive.²¹⁸

Notwithstanding the foregoing, the use of a standard form of contract does not affect the fundamental principle that parties are free to contract on whatever terms they agree to. Accordingly, it is therefore always open to the parties to agree to modify a standard form and this is frequently, and almost invariably, done in practice. In fact, some forms make it clear that certain provisions are drafted so as to be optional.²¹⁹ Such provisions may be left in or struck out of the contract without requiring any consequential amendments.

In order to place the forms of contract in the context of the main focus of the thesis: namely to question whether or not the traditional rules of contract law are appropriate for modifications in a construction context, it is necessary to understand how construction contracts come about, the different routes to delivering projects, and the diversity which exists in the resultant standard forms of contracts. Once this context is established, the thesis is much better placed to then investigate how variations are dealt with in practice in construction contracts, and how the relevant legal principles come into effect. In terms of


²¹⁹ Institution of Civil Engineers, New Engineering Contract - NEC3 Engineering and Construction Contract (London, ICE/Thomas Telford 2006), as an example of a standard form of contract which is drafted in such a way as to enable some clauses to be optional. In brief, this contract contains core clauses which are always applicable, main option clauses which are used to govern payment and an element of risk allocation, dispute resolution options, and secondary option clauses which are used to tailor the contract to suit the chosen procurement strategy and nuances of the particular project. See also Ian Heaphy, ‘NEC versus Fidic’ (2013) 166 Management Procurement and Law 21-30, at 24.
standard forms of construction contract, there is a variety of standard forms available within the Irish construction industry. The choice of a particular form will depend upon a number of considerations, which include the following as key considerations:

**Nature of Employer:** If the employer is a commissioning a publicly-funded project, the choice of form is limited to the Public Works Contract suite of contracts (as part of the Capital Works Management Framework), whereas with a private employer the choice is much wider. Moreover, since the choice of form of contract within the Public Works Contract suite limits to two procurement routes, public works projects do not have the same level of freedom of choice of procurement route as private projects. These important distinctions, and their implications, will be discussed in more detail later in this work.

**Composition of the team:** The agreed contract will confirm who is to undertake certain specific duties and accept certain obligations. For example, the extent to which construction and design responsibilities are allocated as between the professional consultants, the main contractor and specialist subcontractors should be evident from the terms of the contract. If a specialist contractor is to become involved in the design process, then contractual provision must be made for this to be effected. This also precipitates the procurement route decision, as to apportion significant design responsibility to the contractor can be done through the selection of a design and build procurement route.

220 The Capital Works Management Framework (CWMF) and the Public Works Contracts (PWC) will be discussed in more detail in the next chapter. At that point their history, background, philosophy and effects will be investigated in more detail.

Documents for pricing purposes: With traditional procurement, the appropriateness of fixed price lump sum contract will depend on tenders having been prepared on the basis of the fullest possible information. Where that information is unlikely to be available at tender stage, lump sum contracts are unlikely to be satisfactory and alternatives will have to be considered. Such alternatives might include procurement decisions on where design responsibility should lie, for example:

“The lump sum contract is suitable where the project performance specifications are clear. Fixed price contracts are widely used for projects of a repetitive nature such as standard buildings or factories. The contractor takes all the risk for changes in quantities or ground conditions. Any client-initiated changes can be costly because their financial implications have to be negotiated and paid for on a reimbursable basis.” 222

There is a wide choice of available standard forms of contracts, and the existing forms are regularly updated by either complete revision or by the issue of amendments to take into account of requests from the industry, construction law developments or changes in practice. A major advantage of using a standard form of contract is that those who use it regularly become familiar with its contents, and a body of case law emerges around its practice. Practitioners thus become aware of its strengths and weaknesses and its suitability for specific purposes.

The majority of standard forms that are in use today, have been prepared by groups who together represent the interests of all sides of the construction industry. “Trade associations and similar entities often effect standardisation of this kind through collective agreement on a standard contract.” 223 In construction contracts the interested groups are generally those with a stake in the industry, such as professional bodies for engineers, architects and other construction


professionals; trade associations for construction professionals; and contractor representative groups. A main and notable exception to this normal process is the introduction of the Irish Public Works Contracts, which have become obligatory for use for public works, and which were introduced with limited consultation with construction industry representative groups. 224

What has been presented in the previous sections establishes the context for some of the key decisions in construction projects, and outlines the high-level risk profile of construction projects, and hence the importance of selecting conditions of contracts which best manage those risks insofar as they can be foreseen.

3.4 Standard Contract Terms in Construction Contracts

The proceeding sections will first look at the procurement approach in the UK for both public and private works; and then Ireland for both public and private works. The approaches adopted by both jurisdictions will be seen to be not directly comparable, primarily due to restrictions with Irish public procurement procurement. The thesis will be advanced by these next sections highlighting the key differences, by following a structure of investigating the procurement options before moving on to some of the available conditions of contract: conditions which are available by virtue of the procurement routes in certain circumstances.

224 See Hank Fogarty, ‘Contractor perspective of the new Irish public works contracts’ (2009) 162 Management, Procurement and Law 29-34. The first draft of the new forms was issued in 2005, following which, the Government Construction Contracts Committee invited key industry stakeholders (the Construction Industry Federation, the Association of Consulting Engineers of Ireland and the Construction Industry Council), to engage in a consultative process. Discussions continued over the following 15 months and whereas the GCCC was persuaded to remove some of the more objectionable provisions such as the deletion of contractors’ common law rights from the contract, and to reduce the impact of others, the core principles of risk transfer to contractors remained intact. In February 2007 the new contracts were issued by the GCCC and the present position is that all public projects tendered must be under the new forms.
3.4.1. The UK Approach to Public Works Contracts

As has already been mentioned, the UK approach to public works is markedly different to the Irish public works contract development. Indeed, in this context, it might be more accurate to state that it is the Irish approach that has been the one with the greater difference, since, chronologically, the Irish system is the more recent of the two.

In order to understand how the two countries have adopted different approaches, it is first necessary to briefly outline the background to the current UK construction industry. The UK construction industry had long been seen as something of a difficult, confrontational and, as a result, overly expensive and inefficient industry. Various reports carried out by Government and other institutions reports have examined the nature of the UK construction industry: particularly the practice of construction management, and have consistently

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225 Peter Fenn, David Lowe and Christopher Speck, ‘Conflict and dispute in construction,’ (1997) 15 Construction Management and Economics 513-518, at 513: “The UK construction industry exists within an adversarial society … [C]onflict is pandemic; it exists where there is incompatibility of interest.” Anthony Layers, ‘Construction Conflict: Management and Resolution Analysis and Solutions,’ in Peter Fenn and Rod Gameson (Eds), ‘Construction Conflict Management and Resolution,’ Proceedings of the First International Construction Management Conference, The University of Manchester Institute of Science and Technology 25-27 September 1992, London, E&F Spon.: The authors note a “500% increase in the initiation of litigation [in construction] in the twenty years to 1986,” and comment that construction conflicts were seen as “inevitable … and endemic in the industry.” Sir Michael Latham, Constructing the Team, Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry, Final Report, (The Latham Report, London, The Stationery Office 1994): Chapter 3 on how clients’ needs were not being met by the industry. Chapter 5 notes that surveys relating to the subject of the report have produced interesting findings. These surveys were carried out under the auspices of the “New Builder”/JT Design Build attitude surveys in 1993, and involved a panel of 150 major companies including public and private sector clients, civil engineering contractors, materials manufacturers, subcontractors, general building contractors and professional consultants. “The sample considered that the main strengths of the contractual arrangements were that they were well known/established (58%) and fair (42%). The main weaknesses were listed as encouraging conflict/litigation (52%), insufficiently clear (45%) and created a high level of mistrust (38%). When asked to list their three most important changes to improve the general efficiency and productivity of the industry, the second most popular choice (40%) was for ‘simpler contracts … especially for small sized projects.’”

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commented upon the need for improvement and change. However, much of the suggested reforms of these reports had “either been implemented incompletely, or the problems have persisted.” The construction industry procedures in the UK were described as ineffective, adversarial, fragmented, incapable of delivering for its customers, and lacking respect for its employees.

The *Latham Report*, was directly produced in response to a lack of growth in the UK construction industry in the period 1990 to 1993, which was seen to be as a consequence of the tendering and procurement procedures prevalent prior to that time of wider economic recession, and a result of a failure to take meaningful action on the previous studies of the industry’s inefficiencies. The *Latham Report*, then, particularly “highlighted the need for a modern construction contract to include, among other things, duties of fairness, teamwork, mutual co-operation and shared financial motivation.”

Key recommendations of the *Latham Report* were that the development of a “Modern Contract” was necessary to improve the effectiveness of the construction industry. It noted, in particular, that the heretofore practice of

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“[e]ndlessly refining existing conditions of contract will not solve adversarial problems.” Central to solving this problem was the first edition of the New Engineering Contract (NEC),\textsuperscript{231} which, according to Latham,\textsuperscript{232} “fulfils many of these [basic principles of a modern contract] and requirements, but changes to it are desirable and the matrix is not yet complete,” though it is noted that the NEC “contains virtually all of those assumptions of best practice, and others, which are set out in the Core Clauses, the main and secondary options.” A number of alterations to the NEC are proposed by Latham; many of which are now evident in the current, third version, NEC3, correctly entitled the Engineering and Construction Contract (ECC).\textsuperscript{233}

The legacy of the \textit{Latham Report}\textsuperscript{234} is the source of some varying views in the industry. Some note that while the Report made 30 key recommendations, only one has been implemented.”\textsuperscript{235} Others point to the development of the NEC\textsuperscript{236} conditions of contract as the embodiment of the \textit{Latham Report’s} legacy. Studies have shown that the current version of the NEC\textsuperscript{237} conditions are now

\begin{itemize}
\item \textsuperscript{231} The Institution of Civil Engineers, \textit{The New Engineering Contract} (London, Thomas Telford 1993).
\item \textsuperscript{233} \textit{The NEC Engineering and Construction Contract} (3rd edition, Thomas Telford 2005). This third version of the NEC contract was preceded by the 1995 second edition, (referred to as NEC\textsubscript{2}), The Institution of Civil Engineers, \textit{The NEC Engineering and Construction Contract} (2nd edition, Thomas Telford 1995). In fact, some of Latham’s recommendations were also incorporated in the second edition and remain in the third edition.
\item \textsuperscript{236} Institution of Civil Engineers, \textit{The NEC Engineering and Construction Contract} (3rd edition, Thomas Telford 2005).
\item \textsuperscript{237} Ibid.
\end{itemize}
“almost fully compliant with the principles of Latham’s modern contract.” On the NEC3 conditions of contract, the author of the Latham Report, Sir Michael Latham, is very supportive:

“In addition to supporting the OGC’s [Office of Government Commerce] recommendation that NEC3 be used by all public-sector construction procurers, I also commend its adoption by any private sector client wishing to procure their construction work on time, within budget and without litigation.”

If the development of the NEC contract is deemed to be a manifestation of the Latham recommendations, then the changing environment in the UK, which puts the NEC contract to the fore, is evidence of the Latham Report recommendations achieving wider recognition and implementation. A further example of this is the 2011 withdrawal by the Institution of Civil Engineers (ICE) from its own conditions of contract in favour of the NEC conditions. The significance of this withdrawal should be seen in the context in which the ICE conditions of contract were first published in 1945, were the de facto conditions of contract for almost all civil engineering work in the UK, and by virtue of the similarities


between the ICE conditions and the Institution of Engineers of Ireland versions, in Ireland also.\textsuperscript{241}

The relevance of \textit{Latham} to this thesis is two-fold. The first, as described in the foregoing, is that it set the foundations for a different approach to construction projects in general, and public works in particular, to that which emerged in Ireland. While \textit{Latham} envisaged a more collaborative and less confrontational industry, for the purposes of increasing efficiency, the Irish approach (as will be seen in subsequent sections) has been to take a more rigid and one-sided approach to dealing with contracts for public works.

The second, and perhaps more valuable aspect which \textit{Latham} brings to this thesis, is the recommendation of particular payment provisions to be implied into building contracts, and its recommendation of a new type of mandatory dispute resolution mechanism: adjudication. These features have since been enacted into UK legislation by way of \textit{The Housing Grants, Construction and Regeneration Act 1996}. This separate treatment by the law, relating to construction contracts, is partially replicated in Ireland, through the \textit{Construction Contracts Act 2013}, and will be discussed later in this thesis. Despite criticism from various sources,\textsuperscript{242} a

\textsuperscript{241} The ICE Conditions of Contract are a now-discontinued family of contracts for use on civil engineering contracts. The first edition of the ICE Conditions of Contract was published by the ICE in 1945, in association with the Federation of Civil Engineering Contractors (now the Civil Engineering Contractors Association (CECA)). Subsequent editions followed in association with CECA and the Association for Consultancy and Engineering (ACE). Most recently the 5th (1973), the 6th (1991) and the 7th (1999) editions were published. The ICE’s part ownership of the contract has (since August 2011) been transferred to the Association for Consultancy and Engineering (ACE) and the Civil Engineering Contractors Association (CECA) and the contracts have been withdrawn from sale, and the ICE Conditions of Contract have been rebranded as the Infrastructure Conditions of Contract (ICC). See also <http://www.ice.org.uk/topics/lawandcontracts/ICE-Conditions-of-Contract> accessed 9th May 2013. Since, at the time of writing this thesis, the contract formerly known as the ICE 7th Edition is still generally used by that designation, it will be referred to in this document as the “ICE/ICC Conditions of Contract” for the purposes of clarity. See also Institution of Engineers of Ireland, \textit{Conditions of Contract and Forms of Tender, Agreement and Bond for use in connection with Works of Civil Engineering Construction}, (3rd edition, Dublin, Institution of Engineers of Ireland 1980).

significant amount of Latham’s proposed recommendations became legislatively enacted, indicating perhaps, that it may indeed be desirable to propose that Irish construction contracts are also significantly different, in their own right, as to necessitate further special treatment in law. Furthermore, and as will be discussed later in the thesis, the fact that the Construction Contracts Act 2013 has come into force demonstrates that it is, under certain circumstances, appropriate to legislatively distinguish construction as a special class of contracts. What will be further examined here, is whether the necessity to adhere to the full rules of contract formation is desirable in all instances of contract amendments to Irish construction contracts.

3.4.2. The Standard Forms of Construction Contract Currently in Use in the UK (including Public Works)

A number of standard forms of contract are used in both public and private construction work in the UK. Of the many contracts available, the following contracts are used in the vast majority of construction work, and for the purposes of this thesis, discussion will be limited to these:

243 Others include those produced by the Institution of Chemical Engineers (IChemE); the Association of Consultant Architects (ACA); the Institute of Engineering and Technology/Institution of Mechanical Engineers (IET/IMechE); the International Federation of Consulting Engineers/Fédération Internationale des Ingénieurs-Conseils (FIDIC); and Construction Excellence.

• JCT (Joint Contracts Tribunal) Family of Contracts

• Infrastructure Conditions of Contract (ICC) (formerly the ICE [Institution of Civil Engineers] 7th Edition) (referred to here as ICE/ICC Conditions of Contract)

• NEC (New Engineering Contract) Family of Contracts

• GC/Works Family of Contracts

**JCT Standard Building Contract**

The JCT produces a family of contracts, but the most commonly used type is what is referred to as the Standard Building Contract. There are three versions of the Standard Building Contract, which is published for the Joint Contracts Tribunal Limited. These are:

- The Standard Building Contract *with* quantities (SBC/Q)
- The Standard Building Contract *without* quantities (SBC/XQ)
- The Standard Building Contract *with* approximate quantities (SBC/AQ)

245 The Joint Contracts Tribunal is a body comprising representatives from a number of member bodies consisting of the professional institutions and organisations: the Royal Institute of British Architects, the Royal Institute of Chartered Surveyors, the Association for Consultancy and Engineering, the British Property Federation, the Contractors Legal Group Limited, the Local Government Association, the National Specialist Contractors Council, and the Scottish Building Contract Committee. The JCT produces standard forms of contract, guidance notes and other standard documentation for use in the construction industry. The JCT contracts are used for building projects rather than civil engineering projects, and hence refer to the Architect as being the contract administrator in contrast with the ICE contracts which refer to the Engineer. The NEC suite of contracts simply refer to the Contract Administrator.

246 See note 269 on the ICE Conditions of Contract.

247 The New Engineering Contract suite of contracts are also produced by the Institution of Civil Engineers, and are referred to as the NEC contracts to distinguish themselves from the former ICE family of contracts.

248 GC stands for Government Construction. These are contracts which are historically predominant in public works building projects in particular. The more widespread use of the NEC suite of contracts is seen as eroding the continued usage of the GC/Works contracts.

The first two versions above create a lump-sum contract, whereas the third version is for use where the quantities in the Bill of Quantities are approximate and are all to be remeasured.250

The most common of the Standard Building Contract is the JCT 2005 SBC/Q (Standard Building Contract with Quantities)251 and is used extensively in the UK building industry. The JCT Standard Building Contract is key “traditional”252 contract in this suite of contracts.

The 2005 version of the JCT Standard Building Contract contract contains many changes from earlier versions; the key changes which are briefly referred to below:

- Default position is now legal proceedings not arbitration
- If arbitration is required, then contract particulars must be amended
- Retention bond
- Retention percentage – now 3%, not 5%
- Facility for Contractor Designed Portion
- Professional indemnity insurance required for Contractor Designed Portion
- Clause suggesting that parties consider the mediation of disputes

Variations are covered primarily under Clause 3.14, where, “The Architect/Contract Administrator may issue instructions requiring a Variation.”253


251 Joint Contracts Tribunal, Standard Building Contract With Quantities, (Revision 1, Sweet & Maxwell 2007).

252 “Traditional” in this context refers to the procurement method of Design-Procure-Construct, referred to previously in this thesis.

At Clause 5.1, a Variation is defined as:

“[T]he alteration or modification of the design, quality or quantity of the Works, including:

1. the addition, omission or substitution of any work;
2. the alteration of the kind or standard of any of the materials or goods to be used in the Works;
3. the removal from the site of any work executed or materials or goods brought in thereon by the Contractor for the purposes of the Works other than work, materials or goods which are not in accordance with this Contract.”

Infrastructure Conditions of Contract (ICC) (formerly the ICE 7th Edition) (referred to here as ICE/ICC Conditions of Contract)

Civil engineering works are still carried out under standard forms of contract formerly issued by the Institution of Civil Engineers (ICE) for Civil Engineering works. The most widely-used of these contracts is the ICE Conditions of Contract Measurement Version 7th Edition, (July 2004), which is based on the traditional process of works which are designed by the Engineer and built by the Contractor, where the work is valued by a process of ad-measurement or re-measurement. It is this version of the contract which is referred to here as the ICE/ICC Conditions of Contract. The ICE/ICC Conditions of Contract is the 7th Edition of the ICE Conditions of Contract, and has been available since 1999, and reprinted in 2003 with amendments. It is generally known as the Measurement Version to distinguish from other ICE types of contract.

Under this form of contract, the Engineer performs the traditional role of advising the Client, designing the works, supervising construction, certifying payment and

254 Ibid. at Clause 5.1.


256 See fn 255 on the suite of contracts produced previously by the Institution of Civil Engineers.
completion, and adjudicating impartially in the case of disputes between the client and the contractor.

In essence, it is very similar in nature to the Institution of Engineers of Ireland (IEI) 3rd and 4th Editions. Indeed, it contains an almost identical Sub-clause 51(1) to the IEI 3rd Edition, with some deviations from the IEI 3rd Edition in Sub-clauses 51(2), 51(3), 51(4) and 51(5). Principal amongst the differences is the provision for the Contractor to propose variations, which is covered under Sub-clause 51(3):

“The Contractor may at any time submit to the Engineer proposals to vary the Works. If such proposals are accepted (whether as submitted or with modifications) the Engineer shall issue an appropriate order…”

Notable features of this contract relate to authorising variations and deciding payments. For instance, the Engineer’s decisions can be taken by the employer or contractor to conciliation procedures (“amicable resolution”), adjudication and/or arbitration. Litigation is not mentioned, but it is possible that litigation can be used by agreement by both parties or where an adjudicator’s decision is not complied with.

The Contractor can claim extra payment and/or extension of time for unforeseen physical conditions, (other than weather) which “could not…reasonably have

\[257\] Institution of Engineers of Ireland, *Conditions of Contract and Forms of Tender, Agreement and Bond for use in connection with Works of Civil Engineering Construction*, (3rd edition, Dublin, Institution of Engineers of Ireland 1980). This form of contract is more usually referred to as the ‘IEI 3rd Edition’ or a variation thereof. It is developed very closely, and identically in some respects, to older versions of the ICE Conditions of Contract, and therefore many of the learnings of the ICE Conditions in practice apply equally to the IEI Conditions also. This contract will be discussed more fully in the next section.

\[258\] The Engineer is named in the ICE/ICC Conditions of Contract (as with all previous versions also), and performs the role of the Contract Administrator. The Engineer nominates the Engineer’s Representative, who deals with day-to-day matters on site, usually in the capacity of Resident Engineer.

\[259\] ICE/ICC Conditions of Contract, at Clause 66.
been foreseen by an experienced contractor.”

This is in addition to the already broad provisions allowing contractors to present claims for constructional difficulty; a mechanism which is very widely used for such purposes.

Payment is calculated on the basis of re-measurement of work done at rates tendered in Bill of Quantities. Re-measurement is a feature of civil engineering contracts; primarily owing to the lack of absolute certainty of quantities at the design stage of a project. In a building project, it is relatively easy to state the exact quantities of concrete blocks, steel joists, flooring systems, etc, and such quantities are calculated by a quantity surveyor using a standard method of measurement. A quantity surveyor is employed, since the architect (who usually designs buildings rather than civil engineering works) excels particularly on the aesthetic aspects and may require support on the technical side. By contrast, a civil engineering project is sometimes not very technically complex, but may be much more uncertain; particularly since a characteristic of much civil engineering work relates to activity at and below ground level. Due to


261 Ibid, at Clause 12.

262 The Bill of Quantities is a schedule of rates, usually prepared by the Quantity Surveyor on building projects, or the Engineer on civil engineering projects, which gives the unit price for a given piece of work, as required for the completion of the project. See Atkin Chambers, *Hudson’s Building and Engineering Contracts*, (12th edition, London, Sweet & Maxwell 2010), at 3-016: “In many traditional contracts, the Bill of Quantities will, by virtue of express provisions in the contracts, be found to constitute the exact measure of the work undertaken by the builder for the contract price, though not of their obligation to complete. These will be classically measured contracts, and the price will be adjusted to take account of any difference between the original estimated quantities form which the tendered contract sum has been calculated and the final “as built” quantities. Apart from this function, the usually serve, under the terms of even a lump sum contract, as the basis for valuations of variations...” See also Atkin Chambers, *Hudson’s Building and Engineering Contracts*, (12th edition, London, Sweet & Maxwell 2010) at 3-018; and Stephen Furst and Vivian Ramsey (eds), *Keating on Construction Contracts*, (Eight Edition, London, Sweet & Maxwell 2006) at 1-018.

263 See Stephen Furst and Vivian Ramsey (eds), *Keating on Construction Contracts*, (Eight Edition, London, Sweet & Maxwell 2006) at 13-002, where the architect is described as “one who possesses, with due regard to aesthetic as well as practical considerations, adequate skill and knowledge to enable him (i) to originate, (ii) to design and plan, (iii) to arrange for and supervise the erection of such buildings or other works calling for skill and design in planning as he might, in the course of his business, reasonably be asked to carry out in respect of which he offers his services as a specialist...”
this aspect of the type of work, it is more usual that the civil engineer will create the bill of quantities himself or under his control. However, since the quantities determined at the outset of a project are based upon estimates formed from such information as site investigations, it is necessary to provide that should the quantities be more than those assumed at that point, that the contractor will be sufficiently remunerated. The converse also applies. Such a mechanism is what is referred to as a re-measurement or ad-measurement contract, and the ICE/ICC Conditions of Contract is one such form. The essential principle of a re-measurement contract is that it is not a lump-sum contract, since much variability exists at tender stage, and hence the language used refers to the “Contract/Target Cost” instead. As work progresses, the contractor submits for payment at regular intervals, and is paid for the actual work done (relating to the permanent works). Should the quantity actually done for a particular item exceed the estimate in the bill of quantities, the amount payable to the contractor is the actual quantity multiplied by the bill of quantities rate for the given item, subject to boundary limits, as referred to in subsection 3.2.1.

**ICE New Engineering Contract (NEC3 Contract)**

This is the only currently-produced ICE family of contracts, and since 2011 is the ICE’s preferred suite of contracts. It is a different form of contract from other building and civil engineering forms used heretofore, in that it has a core contract form with additional types of add-ons to enable it to be used in a variety of circumstances. The first version of the New Engineering Contract was published by the ICE in 1991, and this was identified by Latham as being a very large step in that direction:

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264 ICE/ICC Conditions of Contract, Clause 60.

265 As of 2013.


The New Engineering Contract contains virtually all of these assumptions of best practice, and other, which are set out in the Core Clauses, the main and secondary options.  

Since that support by Latham, the contract was renamed the Engineering and Construction Contract, a number of revisions and amendments were made. The Engineering and Construction Contract, now in its third edition (NEC3), comprises a suite of contracts for use across a wide range of building and civil engineering projects. The essence of the contract is that the Employer selects the basis of payment (whether the bill of quantities is to form part of the contract, or whether an activity schedule will be relied upon). Once that decision is made, the Employer may chose from up to 15 secondary options, depending on the main option selected. A significant output of the Latham Report was the development of a “modern” contract, which attempted to diminish conflict in the construction industry and develop more collaborative approaches, with the

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271 See fn 270 - options A to F represent the initial selection by the Employer in terms of payment mechanism.

purpose of reducing inefficiency in increasing the industry’s effectiveness. The emphasis of the suite of contracts is described as “collaborative, co-operative working, and the tools it provides prompt users to move towards a foresight-based, real-time project-managed environment to get the best out of supply chains.”

It is drafted on a “relational contracting basis that embodies efficient management processes,” which is indeed in marked contrast to the Irish Government’s one-size-fits-all and non-negotiable approach.

Features which are consistent with Latham’s aspirations of a modern contract include the fact that all versions of the contract have identical core clauses. This allows for the development of familiarity and consistency among its users, and enables those regularly involved with this contract to foster a degree of comfort with the repeated use of conditions with which they have become satisfied in their usage and interpretation. Consequently, the forms of contract are not intended to be limited to civil engineering projects; but rather the aspiration is for much more widespread usage in the industry. It has been designed to cater for all aspects of procurement of products and services. An interesting characteristic is the fact that contract administration is carried out by the “project manager”; not the engineer, architect, or other specified person more usually found in other contract forms.


275 Such as ICE/ICC Conditions of Contract (where the contract administrator is the ‘Engineer’) and Joint Contracts Tribunal, Standard Building Contract With Quantities, 9Revision 1, London, Sweet & Maxwell/JCT 2007), where the contract administrator is the ‘Architect.’
ICE Engineering and Construction Contract (NEC3 Contract)

The core clauses include for early warning mechanisms designed to allow the contractor to alert the client to the possibility of something occurring in the future which may have an effect on the completion date, cost, or both. This is quite a radical departure, since under the more traditional contracts, such eventualities were in fact the opportunities upon which many contractors survived, and even thrived.

The main contract, containing the core clauses, is then supplemented by a specific set of options, which depend on the nature of the project at hand. Despite its radical departure from traditional contracts, it is said that the core clauses, notwithstanding their novel language, are indeed very closely related to the standard ICE/ICC Conditions of Contract, and hence their effect is the same.²⁷⁶ The options are intended to allow for specific provisions relating to, for example, whether the project should be lump sum or cost reimbursable. In addition, there are a number of secondary options, which are somewhat akin to appendices, covering such matters as price variation, legislative changes, foreign currency exchanges, early completion bonus, retention, and limitation of liability, amongst others.

Programme and programme management is a key departure for this form of contract, and this is what is so key to the early warning mechanism mentioned above. According to Hind:

“`The accepted programme becomes one of the key fundamental tools on an ECC [NEC3] contract. Both the contractor and project manager have a key part to play in the programme acceptance process. As well as being a key management tool to which the contractor intends to carry out the works, it will form the basis on which to assess any change and entitlement to the contractor in terms of time and prices. Unlike other forms of contract there is a contractual requirement to regularly update the programme, and once accepted, this will become the new ‘contract

programme’ which forms the baseline from which to measure future progress and change.”

This emphasis on contract programme, and the requirement to constantly monitor and update same is one of the key differences between this and other forms of contract. Under other, “traditional” forms, there was (is) no obligation on the project manager or contract administrator to accept any revisions to the programme during the lifetime of the project. However, under the NEC3, the programme therefore becomes the key determinant for liability for delays in relation to planned completion and completion date milestones. The objective is therefore that the accepted programme becomes a real, live management tool, rather than the more usual phenomenon of an agreed programme being a static snapshot of the aspirations of the project team at the commencement of a project.

The NEC3 has, and is being used for several high profile infrastructure projects in the UK, such as the London 2012 Olympics Legacy Project (as well as the actual London 2012 Olympics Project - which the Legacy Project is merely a part of), Crossrail and the NDA nuclear decommissioning programme.

The General Conditions of Contract for Building and Civil Engineering Work (generally-referred to as the GC/Works Family of Contracts) Finally in this section on conditions of contract in use in the UK, it is proposed to very briefly mention the GC/Work family of contracts. These are standard government forms of contract intended for use in connection with government or other public construction works. These contracts are worth mentioning in this thesis due to the interesting difference apparent between the GC/Works forms of contract and the Irish Public Works Contracts, in that the Irish contracts are lump


278 See fn 1.

sum contracts, whereas in the UK GC/Works contracts can be re-measured or lump sum. Again, this highlights a strong variance between the Irish approach to public procurement and wider practice, which will be discussed more thoroughly in the next sections.

As with other forms of contract discussed, this is also a suite of contracts, and the type most widely-used is GC/Works/1, either the With Quantities or Without Quantities versions. However, it is noted that usage of the GC/Works/1 forms of contract has declined significantly in recent years and it is observed that the GC/Works/1 forms of contract are currently only available for purchase by special order.

The GC/Works contracts are organised as follows: 1. GC/Works/1 (1998 and 1999), which is a standard form of contract for major UK building and civil engineering works, available with Model Forms and Commentary, and available in the following versions: GC/Works/1 With Quantities (1998); GC/Works/1 Without Quantities (1998); GC/Works/1 Single Stage Design and Build (1998); GC/Works/1 (1999) Two Stage Design and Build Version; and GC/Works/1 With Quantities Construction Management Trade Contract (1999). 2. GC/Works/2 Contract for Building and Civil Engineering Minor Works (1998), which is a standard form of contract for minor UK building and civil engineering works. Comprised of General Conditions plus Model Forms and Commentary. Lump sum tenders are sought on a Specification and Drawings basis only (without Bills of Quantities), with option for Employer to require Contractor to provide a Schedule of Rates for the valuation of variations. 3. GC/Works/3 Contract for Mechanical and Electrical Engineering Works (1998), which is a standard form of contract is intended for Mechanical and Electrical Engineering Works (General Conditions plus Model Forms and Commentary). Tenders are invited on a lump sum Specification and Drawings basis, with optional provisions for the use of Bills of Quantities or Schedule of Rates. 4. GC/Works/4 Contract for Building, Civil engineering Mechanical and Electrical Small Works (1998). 5. GC/Works/5 General Conditions for the Appointment of Consultants (1998), which is designed for use with the (1998) and (1999) editions of GC/Works contracts for the appointment of the relevant consultancy services associated with the construction works. Appointed on a single project basis. 6. GC/Works/5 General Conditions for the Appointment of Consultants: Framework Agreement (1999), which is designed for use with the (1998) and (1999) editions of GC/Works contracts for the appointment of consultancy services (associated with the construction works) on a “call-off” basis over a 3 to 5 year period. 7. GC/Works/6 General Conditions of Contract for a Daywork Term Contract (1999), which is applicable to work of a jobbing type nature. It is based on a 3 to 5 year Contract period. Payment is relatively straightforward; labour at Schedule of Rates; materials at cost plus a percentage addition. 8. GC/Works/7 General Conditions of Contract for Measured Term Contracts (1999), which is based on a schedule of rates, with orders being placed with the Contractor as necessary or required over a 3 to 5 years Contract Period. 9. GC/Works/10 General Conditions of Contract for Facilities Management (2000). This standard form of contract is intended for procuring Facilities Management services. The introduction in the contract advises that the Facilities Management Contractor can either be appointed as a one stop shop or as a managing agent.


As is apparent from the structure of the suite of contracts, and as referred to previously, it is possible to let this contract as a remeasureable contract if the Employer so chooses, by the use of the ‘With Quantities’ version. Furthermore, this contract also provides a mechanism for the contractor to recover for losses incurred due to ground conditions “which could not have been reasonable foreseen by the Contractor,” placing at least some of the ground risk with the Employer. This fact will be further highlighted when contrasting with the Irish Public Works contracts in the next sections.

3.4.3. The Irish Approach to Public Works Contracts

This important development has been briefly referred to in a few previous locations in this thesis, and it is now appropriate to explain in more detail the process that led to the implementation of new standard forms of construction contract in Irish public works in 2007.

Where capital is in short supply, as is the case for both public and private projects in Ireland at this time, the focus inevitably moves to a question of achieving optimal returns with minimal resources, and the delivery of value for money in investment decisions. The Department of Finance has produced solid guidance in this regard for public projects, and has outlined the various stages involved in a Value for Money review as well as detailed guidance in the methodologies required. The purpose of this initiative by the Department of Finance is “to secure improved value for money from public expenditure” and “to provide


greater accountability to the Oireachtas\textsuperscript{285} and the taxpayer on what is being achieved for public expenditure.\textsuperscript{286} A significant aspect of this approach is to increase the focus on value for money through appropriate dealing with risk and uncertainty:

“Dealing with Uncertainty and Risk: There are a number of approaches that can be used. For example, to deal with uncertainty about the useful life of a physical asset (e.g. a piece of equipment), the estimated useful life of the proposal can be reduced. Another approach is to take an uncertain variable, and assess the probability of high, medium and low values occurring. Finally, the use of sensitivity analysis involves recalculation of the NPV [net present value] in line with changes to the values of key parameters and assumptions. It allows for the discovery of the parameters and assumptions to which the NPV is most sensitive. These will need careful monitoring.”\textsuperscript{287}

Contained in the above are the fundamental principles of risk management which are referred to in previous sections of this chapter.\textsuperscript{288} Since the primary mechanism for managing risk on construction projects is the procurement route and form of contract selected, construction contracts are primarily about the prior allocation of risk between the parties to the construction contract: the employer and the contractor.\textsuperscript{289} In terms of dealing with risk on construction projects in Ireland, there is a selection of standard forms of contract for use on privately-funded projects, and a single set of standard forms of contract for use on public works. Each of these has a different risk profile in terms of the allocation of risk,

\textsuperscript{285} Irish Government Legislature, Lower House of Parliament.


\textsuperscript{288} Ibid. at subsections 3.2 and 3.6 on the principles of risk allocation.

and the emphasis of the standard forms in use on public projects in particular, has been to ensure value for money through the allocation of risk “so that there is optimal transfer of risk to the Contractor.”

This Value for Money process was underway well before the reduction in economic activity which began in 2007. In fact, the Value for Money governmental review began as far back as 1997, and manifested itself in the guidance manual of 2007. Therefore, it would be incorrect to assert that the Value for Money approach to public expenditure was driven solely by the necessity to ensure value for money in the current post-boom economically-difficult period, though the public works construction contracts, which will be discussed more thoroughly in following sections, and which are an output of the Value for Money process, are more arguably in direct response to construction projects which were, at the time leading up to their introduction in 2007, symptomatic of high levels of cost overruns and schedule delays. According to the Capital Works Management Framework (CWMF) Guidance Notes, the strategic objectives of the Framework are to ensure: greater cost certainty at contract award stage; better value for money at all stages during project delivery, particularly at hand-over stage; and more efficient delivery of the project.


In December 2003, the Government took the decision to reform public sector construction procurement, which was seen to be failing as a result of the forms of contract in use. Existent forms of contract tended to be split between whether the project was primarily classified as civil engineering or building. The forms in use for such public works were most commonly the Institution of Engineers of Ireland Third Edition (IEI 3rd) for civil engineering projects; and the Royal Institution of Architects of Ireland (RIA) and also the GDLA standard forms for building projects. This decision was taken in the light of the perception by the Department of Finance of project over-runs in terms of cost and time. The traditional contracts largely in use for public works were therefore seen as outdated and inappropriate for ensuring that projects were completed on time and under budget, and it was decided that new contract forms would be required for all future publicly-sponsored work. At that time also, there was no Irish standard form of contract for works designed by the contractor, and such design and build

293 Civil engineering projects tend to be those projects in which the lead consultant/designer is a civil engineer or civil engineering discipline-lead. Civil engineering projects are typically developments such as roads, water/wastewater, bridges, are are often typified by much of the involving below-ground activity. Building projects, on the other hand, tend to be architect-led, and examples would be buildings like schools, hospitals, universities and public buildings. By contrast with civil engineering projects, most of the work in building projects is above ground, and hence more readily estimated before construction, and less likely to involve significant changes to quantities during construction since there is less unknown when a contractor is tendering before construction begins. See Atkin Chambers, Hudson's Building and Engineering Contracts, (12th edition, London, Sweet & Maxwell 2010) at 5-007. It is usual to execute civil engineering works under re-measurement contracts, and building works under lump-sum contracts.


297 Value for Money and Policy Review of the Construction Procurement Reform Initiative refers specifically to the official view that “The old contracts contained clauses which resulted in an often variable contract sum that normally resulted in cost over runs.” at p.61, (Department of Finance 2011).
projects often used the FIDIC Yellow Book\textsuperscript{298} conditions, which are generally used on international design and build plant contracts, but have been used, with suitable modifications, to provide an option in Ireland for design and build procurement.

By way of background, it should be noted that the Irish Government instructed the Government Construction Contracts Committee (GCCC) to draft and introduce the new forms.\textsuperscript{299} This has culminated in the introduction of the Capital Works Management Framework (CWMF),\textsuperscript{300} of which the output of the CWMF, with the greatest impact on the Irish construction industry, was a suite of new contracts, for use by awarding authorities engaging contractors on public works construction projects. This suite of contracts is generally referred to as either the GCCC contracts or the Public Works Contracts (mostly individually using the prefix “PWC” in their abbreviated form).

\textsuperscript{298}Fédération Internationale des Ingénieurs-Conseils (International Federation of Consulting Engineers), Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (The Red Book, FIDIC 1999). This form of contract is generally referred to as the “FIDIC Yellow Book”. It is primarily used on international contracts but has been used, in a modified format, for design and build contracts in Ireland for some time, since Ireland did not have a dedicated form for such procurement choice until the advent of the Public Works Contract forms dedicated to that procurement route.

\textsuperscript{299}The Government Construction Contracts Committee (GCCC) was set up under Section 11 of Circular 40/02 ‘Public Procurement Guidelines - revision of existing procedures for approval of certain contracts in the Central Government sector’, which reconfigured the existing arrangements for the Government Contracts Committee. The GCCC deals with public works procurement and related issues. The GCCC has key representatives from the main construction-related departments and agencies including civil, building and administrative representation, and the representatives change periodically. See <http://www.kildarestreet.com/wrans/?id=2013-02-13a.263>, accessed 27th May 2013, for the current details of the GCCC, as of 13th February 2013. See also Hank Fogarty, ‘Contractor perspective of the new Irish public works contracts,’ (2009) 162 Management, Procurement and Law 29-34.

\textsuperscript{300}See <http://constructionprocurement.gov.ie/capital-works-management-framework/>, accessed 27th May 2013. The CWMF is a structure that has been developed to deliver the Government’s objectives in relation to public sector construction procurement reform and to achieve greater certainty. It consists of a suite of best practice guidance, standard contracts and generic template documents that form four pillars that support the Framework, namely: A suite of standard forms of construction contracts (alluded to above) and associated model forms, dispute resolution rules, model invitations to tender, forms of tender and schedules; the standard conditions of engagement for consultants, dispute resolution rules, model invitations to tender, forms of tender and schedules; standard templates to record cost planning and control information, and for suitability assessment; and extensive guidance notes covering the various activities in a project delivery process.
The stated aim\textsuperscript{301} of the GCCC Public Works Contracts, which are a component part of the CWMF, was to “introduce lump sum fixed price contracts which will bring cost certainty and value for money to the complex process of procuring and contracting and project managing public works contracts.” The principal methods for achieving these objectives are by creating contracts which are to be fixed-price and-lump sum; moving many contractual risks to the contractor; subjecting the contractor’s claims to strict procedures; and moving more responsibility for contract management to the contractor.

The new CWMF in its entirety, produced by the Department of Finance, is now required to be implemented on all public sector capital construction projects. Primarily, in terms of construction contracts, this includes the Public Works Contracts and the Standard Conditions of Engagement for Construction Consultants. The extent of the compulsory nature of the usage of these forms of contract is directed by the Department of Finance, as below:

“The new Forms of Construction Contracts must be applied to employer designed and ‘design and build’ public works projects in Ireland that are procured directly by a government department, bodies under its aegis, including local authorities or other relevant bodies that provide public services (e.g. schools, voluntary hospitals, etc.)”\textsuperscript{302}

Certainty, in the context of the GCCC Public Works Contracts, comprises both cost and time certainty. To achieve this certainty, means the significant transfer of cost and time risk to the contracting organisation (the company actually constructing the project). While this in itself may not be considered unrealistic, since a basic premise of risk management is that risks should be borne by the party best able to manage them, it has been seen by some to unfairly transfer so

\textsuperscript{301} GCCC Guidance Notes, (Department of Finance 2006).

\textsuperscript{302} Department of Finance Circular 33/06: Construction Procurement Reform - revision of arrangements for the procurement of public works projects and for the engagement and payment of construction consultants, (Department of Finance 2006), at 7.

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much risk to the contractor; some of which the contractor may have little opportunity to adequately manage.\textsuperscript{303} To refer once again to the observation by Sir Michael Latham: “You can reduce it. You can prevent it. You can accept it or you can transfer it. You must not ignore it.”\textsuperscript{304} The Construction Industry Federation\textsuperscript{305} (CIF) in a submission to Government prior to the introduction of the CWMF, referring specifically to the requirement for minor works to also be carried out in the new forms of contract, stated that it has:

“[C]onsistently asserted the difficulties that the new forms of contract will create in the marketplace and has pointed out that even the smallest of contractors will be obliged to engage risk assessors, quantity surveyors and project managers/programmers….and it will be virtually impossible for small contractors carrying out minor works to acquire them. We have repeatedly pointed out that there will be little benefit from these additional costs, and from exposing the smallest of contractors to new and uncertain terms of contract, at the very least until such time as the new contract is seen to be working effectively on larger projects. In this regard, we believe building and civil engineering projects of a value of less than €15,000,000 should continue to use the GDLA and IEI3 [IEI 3\textsuperscript{rd} Edition] forms of contract respectively.”\textsuperscript{306}

An emphasis of the new contracts is that design work is to be 100% complete at tender stage, thereby, theoretically at least, eliminating the need for design changes post-contract and reducing many of the problems under investigation by

\textsuperscript{303} Hank Fogarty, ‘Contractor perspective of the new Irish public works contracts,’ (2009) 162 Management, Procurement and Law 29-34.


\textsuperscript{305} The Construction Industry Federation (CIF) is an industry umbrella representative body, representing 3,000 members covering businesses in all areas of the Irish construction industry through a network of 13 Branches in 3 Regions throughout Ireland and through its 37 Sectoral Associations. It is primarily a contractor’s organisation, and represents the interests of building/civil engineering contractors and property developers for the most part.

\textsuperscript{306} Construction Industry Federation, \textit{Submission to the Department of Finance/GCCC Regarding Public Works Contracts for Minor Civil Engineering and Building Works Designed by the Employer}, (Construction Industry Federation 2006).
this thesis. This requirement means that detailed design must occur prior to tender, and that the costs of required changes (as opposed to client-chosen changes) occurring after this stage will not be borne by that client, as would typically be the case heretofore. It is not difficult to conclude, from an objective, outsider’s perspective, that such a requirement has a certain attractiveness. However, such characteristics may come at a price. Since the basic premise of risk revolves around a risk/reward relationship, a party will not take on a risk unless there is a suitable reward to compensate for the chance of the risk occurring: the suitable reward being reflected in a premium on tender prices to cover such risks. Likewise, in construction, it is not unreasonable to expect that should contractors be expected to carry risks (such as fixed price, lump sum, ground conditions, and archaeology amongst others), they would be compensated for doing so and that tender prices would go up to reflect a risk allocation shift. Equally, there is the assumption that all major risks can, at the design stage on both building and civil engineering projects, be either allocated appropriately or foreseen. It is argued here that this has, in the light of what has been discussed thus far in this thesis, a degree of unrealism about it which is not improving the uncertainty and complexity of construction contracts.

As has already be referred to, 2007, which was the year of the introduction of the new GCCC Public Works Contracts, was also a year at the peak of Irish construction activity, so the economic downturn since 2007 was clearly not a factor relating in any way to the adoption of the new contracts. It could only have been expected at the time of the contracts’ introduction then that the altered risk allocation model of the new forms would have had this effect of increasing tender prices (if not out-turn prices). However, the introduction of the GCCC Public Works Contracts has coincided with the dramatic downturn in the economy.

307 Derived from Ulster Bank Construction Purchasing Managers’ Index, monthly surveys of selected companies which provide an advance indication of what is happening in the private sector economy by tracking variables such as output, new orders, employment and prices across both manufacturing and service sectors. <http://www.ulsterbankcapitalmarkets.com/economicindicators.aspx?gid=ri&ind=19> accessed 2nd April 2013.
construction industry, which has resulted in tender prices dropping steeply (as discussed earlier) with some contractors now taking projects at suspected below-cost tender prices. Of course, the freedom of contract principle certainly remains, and any contractor is free not to enter into a contract should they wish not to do so, though many have entered into contracts for, what can only be presumed to be reasons of attempts at economic survival, but below-cost (in the hope of making up the difference through the limited change/variations opportunities in the new contracts) and without providing for the risks which they are now bearing (in the hope that these risks do not materialise, or themselves passing them down the chain to sub-contractors in the same spirit). A logical outcome is that contractors can either be forced to manage a risk which they have not adequately priced, or they will ultimately fail to manage it by slipping into complete or partial default.

A view that the new contracts are having this effect is considered by Fogarty, whose conclusion on the impact the new contracts are having on the industry, as compared with the aims and objectives of the GCCC, is that:

“[E]ither contractors were making substantial profits under the old form (and an analysis of contractor’s profit figures in published accounts will confirm that they were not) or the new forms are not perceived by contractors as having effected the risk transfer which the Department of Finance intended.”

308 Hank Fogarty, ‘Contractor perspective of the new Irish public works contracts,’ (2009) 162 Management, Procurement and Law 29-34.
The requirement to have 100% design completed before tender stage has increased dramatically the importance of briefing on construction projects. Briefing, in the construction project sense, is defined as:

“[A] dynamic process owing to the complexities in identifying and conveying clients’ actual needs and requirements accurately to the project team and the immense magnitude of project information that needs to be considered during the process. It involves frequent interaction, shared understanding, and commitment among a group of stakeholders of the project, including the client, the end users, and the designers. The briefing process is of a complex and iterative nature, which must integrate business strategy with building requirements.”

In order to facilitate the briefing process, the GCCC contracts require increased project management and administration. Upon appointment, an effective Project Manager will organise project workshops between the client and the design team to ensure that the critical success factors for the project are identified. The process, in a traditional contracting arrangement would be that the briefing would occur in advance of significant, if any, design. The design work, which is informed by the completed brief, then begins with initial design, and progresses to scheme design and onto detailed design. It is at the detailed design stage that sufficient information exists to enable a contractor to adequately tender for the works, and once a tender is accepted, the contract for the construction of the works exists. Prior to the signing of the contract is referred to as pre-contract; and this stage is typified by design and contract document preparation. The period which follows signing the contract (post-contract), is usually synonymous with construction activity on site.

Ann TW Yu, Qiping Shen, John Kelly, Kirsty Hunter, ‘Investigation of Critical Success Factors in Construction Project Briefing by Way of Content Analysis,’ (2006) 132 Journal of Construction Engineering and Management 1178. The output of the briefing stage of a project is the “project brief, which is the full statement of the client’s functional and operational requirements for the completed project.” The project brief translates the strategic brief as articulated by the client, perhaps through the use of value management or other elicitation techniques, into construction terms, specifying performance requirements for each of the elements of the project. Essentially, the project brief provides the basis on which design can proceed, and is a vital milestone in this regard. The ultimate goal of the design team is to ensure the end product matches the current and future requirements of the client organisation, which is ultimately based on the brief produced by the client. Poor definition of the project objectives and measures of success at the early stage of a project often results in the end product not achieving the expectations of the end user. Effective briefing is therefore critical to the success of the project, and it is vital that sufficient thought and effort is invested at this stage. Clearly defining and articulating the goals and priorities for the project is essential. In reality people make different assumptions wherever there are ambiguities, so in order to ensure that all parties have a consistent understanding of the project, all areas of doubt must be closed out in the briefing process in order to ensure that all elements of design are considered and accounted for at the earliest possible stage to guarantee that the tender documents contain the completed and comprehensive design package. The vital aspect of briefing is the relationship between scope for change and cost of change. At the start of a project is when the greatest opportunity for change exists at the lowest cost. That means that in the concept stage of a project, major changes can be made to the design at much less cost (since little effort is expended at this stage) than at, for example, the detail design stage (when considerable work would become abortive). The importance therefore of a comprehensive briefing process is tantamount to the success of the project, since if the objectives: qualitative and quantitative, are not precisely established at the outset of the project, it is unlikely that it will either be possible or financially feasible to make significant changes later in the project lifecycle. Beyond the tender stage on a public project, the scope for change no longer exists.
The nature of the CWMF is primarily to achieve certainty for public sector clients\(^{311}\) (or in projects directly funded by 50% or more from public exchequer sources).\(^{312}\) The word “directly” is interesting in this context, and would suggest that if the public body is not “directly” employing the Contractor then the new forms of contract may not be required to be used. A way in which the GCCC Public Works Contracts could therefore be avoided might be development agreements and Public Private Partnership-style (PPP) arrangements. In these types of contractual structure it is usually the private sector entity that procures the construction of the project. In such circumstances, it would seem that there is no obligation to use the GCCC contracts.\(^{313}\)

An effect of the official circular\(^{314}\) is that it all but eliminates the use of the IEI form (and also the GDLA form) in Ireland. The demise of the IEI contract is notable, since it is the first time in this county’s history that a form of contract for engineering works is not based on the Institution of Civil Engineers’ standard forms of contract: contracts which constitute the basis for almost all civil

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\(^{311}\) Public sector clients, and those required to use the new contracts are defined as follows: “The new forms of construction contracts must be applied to traditional and design and build public works in Ireland that are procured directly by a government department, bodies under its aegis, including local authorities or other relevant bodies that provide public services (e.g. schools, voluntary hospitals, etc).”
Public Works Contracts Training Manual produced by the National Public Procurement Policy Unit of the Department of Finance, at p.17

\(^{312}\) Ibid. at p.18, where the public funding stipulations for the requirement to use the new contracts are defined as follows: “Where the body procuring the public works project is not a government department or a body under its aegis or a local authority or other relevant body that provides public services (e.g. schools, voluntary hospitals, etc) and more than 50% of the funding for the project comes from a source other than the Exchequer, the government department or relevant body, as appropriate, should decide if the new Public Works contracts will apply … Commercial semi-state bodies (e.g. ESB, BGE, An Post) are not required to use the new forms of construction contracts on public works projects unless more than 50% of the funding for the project concerned comes directly or indirectly from the Exchequer.”

\(^{313}\) Based on O’Donnell Sweeny Eversheds’ Practice Note by Mark Varian entitled “Understanding the New Government Contracts.”

\(^{314}\) Department of Finance Circular 33/06: Construction Procurement Reform - revision of arrangements for the procurement of public works projects and for the engagement and payment of construction consultants, (Department of Finance 2006).
engineering works in the UK, and much construction further afield. It is indeed a dramatic shift away from international contracting trends.

3.4.3.1. Variations under the Irish Public Works Contracts

The Irish Public Works contracts do not use the term “variation,” other than with reference to price variation. Instead, the preferred term is “change order.” This is defined as:

“[A]n instruction of the Employer’s Representative to change [including add to or omit from] the Works or to change [including impose or remove] constraints in the Contract on how the Works are to be executed.” 315

In accordance with the previously-stated aims of the Irish Department of Finance to reduce, amongst others, the cost of public construction procurement, an attempt is made to distinguish between instructions/directions to the contractor, given by the Contract Administrator (referred to as the Employer’s Representative); and change orders which may require extension of time and/or additional payment to the contractor.

“If the Employer’s Representative gives an instruction and calls it a direction, but the Contractor considers that it is a Change Order, the Contractor shall be entitled to give notice under sub-clause 10.3, and have the issue determined under clause 10. In addition to the requirements of sub-clause 10.3, the Contractor must give this notice before starting to implement the instruction, otherwise it will be taken to be a direction.” 316

315 Department of Public Expenditure & Reform, Public Works Contract for Civil Engineering Works designed by the Employer, (Department of Public Expenditure & Reform, Irish Government 2011) at Sub-clause 1.1.

316 Ibid, at Sub-clause 4.5.2
Regarding change order instruction to omit part of the works, which have an effect on the date for substantial completion, Clause 9.5 clarifies that, in such circumstances, (and, interestingly, subject to agreement between the Employer’s Representative and the Contractor), the date for handover at substantial completion of the project may be brought forward accordingly:

“If a Change Order omits any of the Works, and the omission will result, or has resulted, in a reduction of the time required to complete the Works or any Section, the Date for Substantial Completion shall be reduced by any amount agreed between the Employer’s Representative and the Contractor. [If there is no agreement, there shall be no reduction.]”

3.4.4. The Standard Forms of Construction Contract Currently in Use in Ireland (other than Public Works)

Some of the key forms of construction contract used by the Irish construction industry are briefly discussed below for the purposes of highlighting the differing nature of these contracts, and the contrast with the GCCC Public Works Contracts. Since the enforceability of contract variations is the key theme of this thesis, some commentary on the varying procedures provided for in the standard forms of contract will be provided. This will be presented in a context of risk allocation profile of varying contract forms. Variation provisions are necessary in standard forms of construction contract, since the nature of construction projects is such that their inherent complexity often requires changes to be made before completion. As already discussed earlier, these changes can originate from different sources: clients may change their minds about aspects of the project and request that alterations are made to the agreed design before completion; design work itself may not have been completed before the contractor was appointed; and changes in legislation or other external factors may force the imposition of changes on the project. Without explicit provision for dealing with variations,
each and every variation request by the employer would require the agreement of the contractor.

Law Society\textsuperscript{317}/CIF\textsuperscript{318} Form of Building Contract - Building Agreement 2001 Edition

This form of contract, issued by solicitors’ and contractors’ professional representative bodies, is generally used where a house is constructed as part of a private housing scheme for a private employer, and is intended to complement a standard contract for the sale of a plot of land upon which the house is to be built. The form holds that the works have been designed and that adequate drawings and specifications are available. Payment is normally agreed on the basis of stage payments, such as at the start of works on site, completion of the ground floor slab, wall plate, and so on.

The construction works may be varied, and the contractor may demand payment for extra works before they are executed. However no valuation rules are set out in the contract in respect of such extra work.\textsuperscript{319} The building agreement sets out in detail how, when and in what manner the contractor must build the house, and how much, when and in what manner the purchaser must pay for the house. The agreement comprises of 17 general conditions, which may be amended or deleted by agreement between the client/consumer and the contractor.\textsuperscript{320}

\textsuperscript{317} The Law Society of Ireland is the professional body for solicitors and exercises statutory functions under the Solicitors Acts 1954 to 2008 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. See <http://www.lawsociety.ie/>., accessed 28\textsuperscript{th} May 2013.

\textsuperscript{318} The CIF is the Construction Industry Federation, which is the national and regional representative body for construction industry employers in Ireland. It is generally comprise of members who are on the contracting side of the industry. See <http://www.cif.ie/>., accessed 28\textsuperscript{th} May 2013.


RIAI 2002 \textit{(main form)}^{321}

This form is used for most private building contracts, other than contracts for single houses, or house improvements. It is issued by the Royal Institute of the Architects of Ireland (RIAI) in agreement with other professional bodies such as the Construction Industry Federation (CIF) and Society of Chartered Surveyors of Ireland (SCSI).^{322}

Two versions of the RIAI 2002 contract are used: one where detailed priced BOQ form part of the contract (yellow form); the other where quantities do not form part of the contract (blue form). In effect, these two versions facilitate both re-measurement and lump-sum payments methods respectively.

RIAI SF 1988^{323}

This Short Form is used for small one-off projects such as house extensions, alterations to small retail units, and so on. It is also issued by the RIAI, and has not yet been tested in the courts. The original intention of this contract, as set out in the guidance notes is that this form of contract, “is intended for use in the case of simple projects in which the Architect acts as Sole Agent of the Employer in the ordinary way and where Nominated Sub contractors are not used and quantities do not form part of the contract.” As the name suggests, it is a very short form of contract, with the actual conditions of the contract running to just over three pages, and 23 main clauses.

Modifications to the contract are permitted under the RIAI forms, exemplified by Clause 3 of the RIAI SF 1988 form, which states:

\begin{quote}
\textit{The Royal Institute of the Architects of Ireland, The RIAI Articles of Agreement Building Contract,} (Dublin, The Royal Institute of the Architects of Ireland 2011).
\end{quote}

\begin{quote}
\textit{Since 12th April 2011, the Society of Chartered Surveyors is known as the Society of Chartered Surveyors of Ireland (SCSI) following a merger of the former body with the Irish Auctioneers and Valuers Institute (IAVI).}
\end{quote}

\begin{quote}
\end{quote}
“Without invalidating the Contract the Architect may instruct the Contractor in respect of any alteration or any addition or omission to the Works or as to the order or period in which the Works are to be carried out, any such instruction shall form a part of the Contract and shall where appropriate be valued by the Architect on a fair and reasonable basis, using where relevant prices in the priced specification/schedules/schedule of rates unless a price has been previously agreed.”

There is a generally-held view that the Law Society/CIF contracts and the RIAI contracts apportion risk between the client and the contractor in an equitable manner, and the contracts’ ability to accommodate modifications enables them to be tailored for varying circumstances.

*Institution of Engineers of Ireland Third Edition (IEI 3rd)*

This is a civil engineering contract issued by the Institution of Engineers of Ireland (operating under the name “Engineers Ireland”). It is used for most private civil engineering projects and, until recently and with amendments, for

324 Under the RIAI forms of contract, the “Architect” is the person named to act as Contract Administrator. It is the Architect acting in the capacity as Contract Administrator who is responsible for the issuance of instructions, as opposed to the Architect in their capacity as the designer of the Works.


326 See Grant Thornton/Mason Hayes & Curran, *The Home Construction Industry and the Consumer in Ireland, Volume 3, Review of Legal Issues*, (Report produced on behalf of the National Consumer Agency, Dublin, National Consumer Agency 2008), at p. 33, “The perception amongst construction industry bodies, for example, RIAI, CIF, Society of Chartered Surveyors and other bodies such as the Law Society, is that the terms of the standard forms of construction contracts, in general, allow for a fair allocation of risk as between the consumer and the contractor … While it is arguable that in certain circumstances the forms of contracts or the law of contracts can operate adversely to consumers, it is important to recognise that the law must also seek to balance the interests of the consumer with that of the contractor, and ensure that a fair allocation of risk occurs.”

327 The IEI is the Institution of Engineers of Ireland, which operates under the name “Engineers Ireland.” It is the professional body for engineering and engineers in Ireland, and is responsible to maintaining the standards and register for the professional title, “Chartered Engineer” in Ireland. The Institution of Civil Engineers of Ireland (Charter Amendment) Act, 1969 gives it responsibility in this regard.

most public civil projects. As has already been mentioned, public civil engineering projects in Ireland, as with public building projects, must now be contracted using the new GCCC Public Works Contracts. Thus, this contract now tends to be used almost exclusively on private civil engineering projects, such as wind farm infrastructural developments.

As might be expected of a civil engineering form of contract, there is an emphasis on site investigation. There is also provision for additional payment if the contractor encounters adverse physical conditions and artificial obstructions, which could not reasonably have been foreseen by an experienced contractor, although, under clause 11, the contractor is deemed to have satisfied itself as to the nature of the ground and sub-soil. In contrast with the Law Society/CIF and RIAI forms of contract, the IEI form of contract is a re-measurement form. This is a notable feature of civil engineering contracts, and (as already mentioned) provides that the contractor is paid, at the agreed rate, for the quantities of work done based on an agreed measure of such quantities. This is in contrast with the lump-sum nature of building contracts, where there is, by virtue of the types of projects undertaken under building forms of contract, more certainty of quantities at tender stage.329

There is wide-ranging provision for the Engineer (who is the named person acting as Contract Administrator) to instruct changes or order variations. The principal provision permitting the Engineer to order variations is Clause 51, and in particular Sub-clause 51(1):

“The Engineer shall order any variation to any part of the Works that may, in his opinion, be necessary for the completion of the Works, and shall have the power to order any variation that for any other reason shall, in his opinion, be desirable for the satisfactory completion and functioning of the Works. Such variations may include additions, omissions, substitutions, alterations, changes in quality, form,

character, kind, position, dimension, level, or line, and changes in the specified sequence method or timing of construction (if any).”  

This provision is supported by the succeeding Sub-clause 51(2), where the extent of the contractor’s ability to make variations are limited: “No such variations shall be made by the Contractor without an order by the Engineer.”

Furthermore, this sub-clause proceeds to clarify the contractual effect of any changes ordered by the Engineer, and notes that the contractor may be entitled to additional payment for some changes:

“No variation ordered or deemed to be ordered in writing in accordance with [Clause 51] shall in any way vitiate or invalidate the Contract, but the value (if any) of all such variations shall be taken into account in ascertaining the amount of the Contract Price.”

The IEI 3rd form of contract clarifies the position surrounding legislative changes which have an effect on the Contract Price, and its consequent adjustment (with punctuation added):

“Where after the Designated Date, the cost of the performance of the Contract has been increased or decreased as the result of legislative enactments or statutory instruments, or the exercise by the Government or Local Authorities or other statutory bodies of powers vested in them, the amount of such increase or decrease

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331 Ibid. at Clause 51(2).

332 Ibid. (with punctuation added).

shall be borne by or shall accrue as the case may be to the Employer, and the Contract Price shall be varied accordingly."

What is apparent is the different types of contract in use on private projects, when compared with the now-obligatory GCCC Public Works Contracts on public projects, have some key differences; particularly with respect to the ability for variations to be made. The GCCC Public Works Contracts are more rigid in terms of variations which can be made, and which they envisage should be made. All of the contracts mentioned in this section permit variations to the contract provided that the client orders such changes. The difference lies in the permissibility of variations to the contract to provide for the eventuation of certain occurrences. This can essentially be considered in terms of risk allocation, and relates primarily to whether or not the contractor has a genuine entitlement to recover for the eventuation of key risks such as unforeseen conditions, or changes in quantities for unexpected events. The risk allocation approach manifesting in the GCCC Public Works Contracts is markedly different to that present in Irish private projects, as well as both public and private projects in the UK, and for a further analysis of the likely implications of such provisions, an examination of disputes: their causes, effects and methods of resolution is necessary to further progress the issue of how risk allocation leads to procurement routes, which leads to conditions of contracts, which in turn then leads to dispute and ultimately dispute resolution.

3.5. Contract Amendments in Irish Construction Contracts

As referred to in the foregoing sections, the main Irish construction contracts, for both public and private works contain variation clauses. As noted, these clauses

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are intended to account for the changes which are likely to occur to a construction project during the construction phase of that project.

Where the main contracts are silent, however, is on the mechanism for agreeing modifications to the contract which are outside of the scope of the variation clause of the contracts. It is noted that freedom of contract exists in construction contracts, as with any other type of contract. Under the circumstances of a change falling outside the scope of the contract variation clause, parties are, for the most part, free to agree to whatever terms they see fit. However, there is no guidance offered in the Irish construction contracts as to the way in which such variations should be agreed in writing, or noted in a specific manner in order to simplify the conclusion of any such renegotiations.

3.6. Subcontracting in the Irish Construction Industry - Contractual Arrangements

As mentioned in the previous chapter, construction projects require high elements of subcontracting, where up to 90% of the work may be delivered by subcontractors rather than the main contractor. The reasons for this are generally due to the main contractor’s desire to be relieved of responsibility for an element of works; the ability of another party (the subcontractor) to complete that portion of work to a higher standard of construction; or the subcontractor’s ability to complete it at a lower cost to the main contractor than for the main contractor to do it himself.

A challenge to subcontractors is to avoid losing out financially, given that they are at the bottom of the chain in terms of the payment process. In other words, until the Construction Contracts Act 2013 (see next section), subcontractors were often at the receiving end of “pay when paid” clauses, meaning that if the main contractor was not paid by the employer, the main contractor was under no
obligation to pay the subcontractors. This problem had become exasperated further, in particular under the Irish Public Works Contract, through the elimination of nominated subcontractors. Nominated subcontractors usually are not quite at the bottom of the chain contractually, and in the event that the main contractor defaults on payment, nominated subcontractors generally have recourse to the employer. Therefore, the Irish public works construction subcontracting industry comprises virtually exclusively small to medium enterprises, who lie at the bottom of the contractual food chain, without the possibility of improving their position through appointment as a nominated subcontractor, and, until the enactment of the Construction Contracts Act 2013, entirely at the mercy of main contractors for payment.

Just as there are standard forms of contract governing interactions between employers and main contractors, so too are there standard forms for main contractors and subcontractors. The most widely-used of such subcontracts is the Subcontract for use with the RIAI main contract form, issued and approved by the Construction Industry Federation and the Subcontractors and Specialists Association. As its name suggests, it is designed to be used with the RIAI main form of contract. It is used much more frequently on nominated subcontracts than on domestic subcontracts. The other notable form of Irish subcontract is the CIF Subcontract for use with the Public Works Contract. Important features of these standard forms is subcontract is that they provide similar terms and conditions as the main contract, and, in the case of the RIAI subcontract, the approval from the Construction Industry Federation and the Subcontractors and Specialists Association indicates that it represents an equitable balance of risk between the two parties.

However, it is noted that a significant percentage, if not most, subcontracts on substantial projects are agreed on the main contractor’s standard terms of

335 Construction Industry Federation, Agreement and Conditions of Sub-Contract for use in Conjunction with the Forms of Main Contract for Public Works issued by the Department of Finance 2007, (CIF 2008).
business, and it is also suggested that many subcontracts are arranged informally, and where key terms, such as payment arrangements and dispute resolution, are not agreed.336

3.7. The Construction Contracts Act 2013

The Construction Contracts Act 2013, which has been briefly mentioned heretofore, is a noteworthy inclusion into the Irish legislation for a number of reasons pertinent to this thesis.

By way of brief history and context for the Act, the Construction Contracts Bill was brought before the Irish legislature as a Private Members’ Bill, and was the first of such to be successfully enacted in over 20 years. A primary purpose was to establish a method to avoid issues of non-payment to subcontractors. The author of the Bill, Senator Feargal Quinn, had identified that, in the midst of the recessionary period of construction activity, which began in 2007, subcontractors tended to suffer severe financial detriment when the employers began slowing or stopping their payments. As mentioned in the previous section, main contractors therefore sought to insulate themselves from the worst of their losses by passing the loss down the contractual chain to the subcontractors, who could pass the loss no further, had no alternative but to bear the loss, and suffer the consequences. The three areas where this Act provides statutory support, are in the creation of mandatory payment provisions; the creation of an entitlement to stop work for non-payment; and the provision of statutory adjudication for payment disputes.

Notwithstanding that statutory adjudication is a well-established interim dispute resolution method in the UK, the Construction Contracts Act brings statutory adjudication to the Irish construction industry for the first time. The key aim of

the legislation in this regard, which parties cannot contract out of, is to ensure prompt payment practices throughout the construction industry. In the UK, adjudication has become increasingly common in construction disputes, primarily due to the enactment of the Housing Grants, Construction and Regeneration Act 1996, which affords the statutory right to adjudication. Specifically, relating to adjudication, the Act states:

6.—(1) A party to a construction contract has the right to refer for adjudication in accordance with this section any dispute relating to payment arising under the construction contract (in this Act referred to as a “payment dispute”).

(2) The right under subsection (1) applies in spite of any term of the construction contract which purports to exclude or limit its application or is otherwise inconsistent with it.

(3) The party may exercise the right by serving on the other person who is party to the construction contract at any time notice of intention to refer the payment dispute for adjudication.

Indeed, the Irish Act and the UK Act have many similarities; both in structure and language. Notable differences exist, however; some of which are outlined below.

Certain types of construction activity are included in the UK Act under the definition of “construction activities” which are not included in the Irish Act. The Irish Act categorises as applicable agreement all contracts: both written and

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338 Ibid. at s. 108: ‘(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.’

339 Construction Contracts Act 2013

oral; whereas the UK Act only includes written contracts. A notable difference also exists regarding the notice of intention to withhold payment. Both instruments explicitly prohibit the “pay-when-paid” clauses, which were referred to in the previous section, with the almost identical wording:

A party to a construction contract may not withhold any part of a payment after the relevant date of a sum due under a construction contract unless he [or a specified person] has given effective notice of intention to withhold payment.

Where the two instruments then differ is in the later parts of the relevant sections. The Irish Act, in contrast with the UK Act (which is silent in this regard) describes the requirements for an effective notice, as referred to above. The Irish Act states that:

(3) To be effective such a notice must specify:

(a) the sum that the payer considers to be due on the date the notice is served…

This is thought by some to be construed as a “pay-if-certified” clause as opposed to the prohibited “pay-when-paid” clause.

341 Construction Contracts Act 2013 s.6.


344 A ‘pay-when-paid’ clause is a clause in a subcontract which states that payment on the subcontract will only be made with the main contractor has received payment on the main contract. This has the effect of passing the burden of financing construction activity down to the subcontractors at the bottom of the contractual chain.

345 Construction Contracts Act 2013 s.7(3), with emphasis added.

However, in terms of provisions for adjudication, further commonality and differences exist. Both provide for statutory dispute resolution procedure of adjudication to apply to payment disputes under construction contracts. Either party is entitled to refer a payment dispute under the contract to an adjudicator, who will be required to reach a decision within 28 days (which period may be extended by a further 14 days by agreement between the parties), although the Irish procedure will apply only to payment disputes; whereas the UK procedure applies to any dispute arising under a construction contract.

An adjudicator’s decision under UK law, is binding on an interim basis pending any referral of the dispute to arbitration or to issue court proceedings, so that the parties must comply with the decision until there is a further decision on the dispute via arbitration or litigation. The Irish Act differs significantly from this approach in providing that the adjudicator’s decision shall not be binding if the payment dispute is referred to arbitration, or if proceedings are otherwise initiated in relation to the decision. This is a significant difference in terms of providing the certainty of the “pay now, argue later” philosophy behind the UK’s approach to adjudication, and may have the effect of limiting the purpose of the Irish legislation if one party can refuse to pay the other party while the matter is under consideration at a subsequent litigation or arbitration.347

What is particularly noteworthy about this legislation is the acknowledgement that the Irish construction industry is an industry which requires special treatment by the law. This legislation only applies to construction contracts. Furthermore, this piece of legislation demonstrates that this special treatment can happen, and if the UK counterpart legislation is any measure of its success, such special treatment has a reasonable chance at success. This is an important conclusion for the purposes of the direction of this thesis: if it is possible to treat construction

differently in law, and if that different treatment is likely to be successful, then it opens up the possibility that other areas of the Irish construction industry could also warrant some special treatment by the law. A further important aspect of this legislation, for the purposes of this thesis, is that this Act only applies to construction contracts, but not all construction contracts. For example, the Act specifically excludes, *inter alia*, contracts which relate only to a dwelling with a floor area of less than 200 square metres and where one of the parties to the contract occupies or intends to occupy the dwelling as his residence, (i.e., it excludes most private dwelling house contracts). This highlights that it is possible and desirable not only to treat construction contracts differently under Irish law, but that it is also possible that some should be treated differently to others by the law. Furthermore, the construction activity that was deemed to be somewhat unique to Ireland and as discussed in the previous chapter, i.e., the one-off nature of the construction of Irish housing, is not actually covered under this legislation. This is quite interesting, given that one-off housing constitutes a larger proportion of the Irish construction industry than the equivalent activity in the UK.

3.8. Conclusions

Much of the material in this chapter has looked at the specific conditions of contract in use in Ireland and in the UK. The UK is an important point of reference for the Irish construction industry, since both jurisdictions are similar in nature, and the industries themselves have common characteristics by virtue of shared history, common legal systems, similarities in education, crossover of actors between both countries, and of course, mutual usage of the English language. It is therefore important that, while being mindful that Ireland is a sovereign nation, it looks to its nearest neighbours to understand their methods of construction project delivery. Significant divergences have emerged recently, particularly with respect to public procurement methodologies, and the Irish
approach is somewhat at odds with the contractual movements in the UK, with the introduction and widespread acceptance of the NEC suite of contracts.\footnote{348} Further work, notably in the UK, to make forms of contract which focus on collaboration between design team and contractor more prevalent are to be welcomed. At present, much divergence exists between the different standard forms of contract, even within and between Ireland and the UK. The introduction by the Irish Government of the Public Works Contracts in 2007 was a radical one, and a move which has dramatically altered the construction contracting business in Ireland.

What has been presented in this chapter is also a brief description of some of the most widely-used conditions of contract in the UK and Ireland, with a particular emphasis on examining how the inevitable variations which occur on construction projects are handled. This chapter has provided a greater understanding of the variety of conditions of construction contract, the relevance of risk allocation to the contractual choices, and a growing awareness that the enforcement of variations which must be dealt with on construction projects, can become a source of contention between the parties to the contract, and is one which the current body of contract law may not be best placed to deal with.

It is noted that risks can only be assessed in as much as is practicable, and allocated in an agreed manner. It is highly unlikely that, in the majority of cases, the completed project will exactly resemble the initial, contracted project. In order to achieve the completed project, it is inevitable that all risks must have been somehow allocated, and some of these risks may have eventuated as the completed, varied project emerged. Consequently, how the variations are dealt with has a direct bearing on the successful completion of projects, or whether they result in lengthy and costly dispute proceedings.

\footnote{348} Institution of Civil Engineers, \textit{Engineering and Construction Contract (NEC3)}, (ICE/Thomas Telford 2005).
It is important to consider these issues in the context of the research question and the overall body of work, as it highlights the further complexity and uncertainty of construction projects. If construction contracts were a single standard construction contract the world over, it would still pose significant difficulty to determine and enforce each and every variation to the contract, but this matter is greatly compounded on the opposite dimension of often radically different conditions of construction contract themselves.

While many projects, (such as aerospace projects, spaceflight projects and military development projects for example), are complex matters, it is argued here that construction projects differ from most other type of project, though are essentially manufacturing projects with much of the work done on site. However, even the in situ element of project execution being in a non-factory environment, may be sufficient to make the construction industry contain certain characteristics of uniqueness, possibly requiring some separate treatment by the law. Construction projects, as with the foregoing examples, are also complex affairs, and the construction industry does have an undoubted degree of uniqueness: in the combination of characteristics evident in its nature; its risk profile; the magnitude of time, cost and effort expended in it; and the implications of ensuing difficulties. The complexity of construction projects stems from the type of project, the technology used, logistical issues, the scale of the project, the nature of the environment in which it is to be constructed, the personnel involved and the political issues associated with its delivery, and the changing needs of the end users. Such complexity cannot usually be fully understood at the outset of a project, save for the most trivial of projects.

Through the introduction of the Public Works Contracts, the Irish Government has demonstrated the need to legislatively distinguish construction contracts from other types of contract. As has been discussed in the foregoing, much of this is due to the uniqueness of construction as an industry, and risk and risk allocation in particular. While a motive for the introduction of the Public Works Contracts
was cost-driven, it was accordingly so due to the unique propensity for costs in
the industry to rise dramatically due to the eventuation of risks. Furthermore, the
mere existence of the Construction Contracts Act 2013 additionally highlights
how the Irish construction industry is shown to receive special legislative
treatment in some aspects. These interesting legislative developments in the Irish
construction industry provide a suitable framework through which to analyse if
the common law legal requirements for contract modification could also benefit
from legislation. The case of *Williams v. Roffey Brothers and Nicholls
(Contractors) Ltd*349 in the area of contractual modifications highlights some of
the legal nuances within construction disputes, and raises the interesting question
which is fundamental to this piece of research: How should the law of contract
deal with modifications to construction contracts? In order to develop this
question further, it is necessary to examine in some depth the relevant areas of
contract law enforcement, such as the consideration requirement for variations to
contracts: especially the situations where no fresh consideration is apparently
provided, the parties wish to agree to the variation, one party possibly
subsequently relies on this promise, and there was no undue influence applied.
Therefore, the following chapters will investigate the contract law principles of
consideration, promissory estoppel and duress (including economic duress),
leading on to a discussion on whether the uniqueness of construction merits
separate treatment for construction contracts.

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4. Enforcement Issues in Construction Contract Variance I - Consideration, Promissory Estoppel and Reliance

4.1. Introduction

Variations to construction contracts have been discussed in particular in the previous chapter, Chapter 3. In the analysis of variations, the reasons why contracts are varied are presented, as well as the mechanisms for doing so under the variation clauses of the standard forms of contract. What was also identified was the limits of what can be instructed under a variation clause; such changes thus necessitating a modification to the contract itself. Thus, there are two classes of changes: those which can be instructed under the contract, and those which necessitate a modification to the contract itself. The preceding sections of this thesis have outlined the circumstances and mechanisms for dealing with the former; this and the next chapter study the latter. The thrust of this thesis is then to distinguish between the two classifications of changes, and to hence propose a new way of dealing with the latter type.

It has already been noted in this thesis that when a contract is modified, the formalities required are the same as if the contract was being created from the start, in order for the modified contract to be enforceable.

“The doctrine of consideration applies the same rules to both the formation and modification of contracts, consequently hindering the ability of parties to a contract to vary or discharge existing obligations.”350

The rules include, *inter alia*, the presence of agreement (offer plus acceptance), intention to be legally bound by the agreement, and consideration for the agreement. A revised agreement, like any contract, is only then vitiable if there is evidence of duress. This chapter begins the examination of the legal aspects

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pertaining to modifications to construction contracts: those changes to
construction contracts which are so large, so fundamentally different to that
which was envisaged by the contract, or indeed merely changes which occur on
projects where there is no formal contract, (Premise 5). It further develops an
analysis of the first of the enforcement aspects of Premise 6: whereby a
modification, verbally-made, and without fresh consideration, may not be
enforceable. It also investigates situations where consideration is absent, but an
element of reliance upon a modified agreement is present. The other component
of Premise 6: duress as a vitiating factor, is investigated in the next chapter,
Chapter 5.

This chapter is structured to firstly look at the doctrine of consideration, and
investigates the nature of consideration in the law of construction contracts. It
will begin by outlining why consideration is required for new contracts and
modified contract, by briefly describing some of the attributes of consideration as
they particularly apply to the subject matter of this thesis. It will then question
the underlying reasons for the decisions surrounding consideration in some key
cases, and reconcile apparently diverging decisions. In doing so, this chapter will
identify that there are situations where alternative approaches to consideration
(such as promissory estoppel) have been used to limited effect, and that there are
situations which justify the treating of certain contracts differently - either
because of the nature of the contract or the circumstances under which they are
taken. This chapter will converge on the case of *Williams v Roffey Brothers andNicholls (Contractors) Ltd*, and will question the merits and examine the
impacts of the courts’ decision to insist on a traditional approach to the finding of
consideration in order to demonstrate the enforceability of a modification to a
contract. The context for the foregoing will continue to be the construction
industry.

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351 The basic rules of consideration will be taken as understood by readers of this thesis.

The doctrine of consideration in contracts is a principle which establishes the enforceability of a promise. \(^{353}\) Consideration, therefore, as one of the requirements for a binding promise, provides that in order for a contract to be enforceable, in instances where the aforementioned prerequisites are also existent, something of value in the eyes of the law must be given for the promise. \(^{354}\) There is a degree of uncertainty about where the boundary between good and bad consideration currently lies, and this has, to an extent, been caused by attempts by the courts to avoid using promissory estoppel and instead insisting on a classical approach of finding consideration in order to enforce a promise; and in the process blurring the boundaries of where good consideration exists. This chapter will probe that uncertainty, and assess alternative approaches to enforcing contract modifications absent of consideration. Its primary aim is to further the question as to whether the traditional rules for contract enforcement are appropriate in a construction context.

4.2. The pertinence of *Williams v Roffey Brothers and Nicholls* (Contractors) Ltd\(^{355}\) to the Irish Construction Industry

As noted in Chapter 2, the Irish construction industry is characterised by the feature of one-off housing. This aspect of Irish construction means that, for a significant proportion of Irish construction activity, and a greater proportion of housing construction than the equivalent in the UK, there is a one-off client building their family home. It is to be expected that many of the clients in such circumstances are relatively unfamiliar with construction contracting and implementation principles, and may not procure a construction professional beyond the services of an architect to design the house for planning permission

\(^{353}\) See *Bracken v. Byrne & Anor* [2005] IEHC 80, where, according to Clarke J, “There is no consideration so as to give rise to a contract.”

\(^{354}\) *Thomas v Thomas* (1842) 2 QB 851.

purposes. Furthermore, it is likely that the actual construction will be built by a single main contractor, supplemented with subcontractors for a variety of specialist works such as electrical, plumbing, glazing, plastering, and roofing, amongst others.

It is therefore to be expected that the legality surrounding the formation of construction contracts for such projects is less likely to be as comprehensive as, for example, a major housing developer, with a company experienced in building houses. The latter, for example, would be expected to utilise one or other standard form of contract in order to assign risk as they see fit; whereas the former could, conceivably, procure the services of the main contractor on the basis of a set of drawings and a quotation. The degree of sophistication of the client in the Irish housing construction sector, is therefore of a lower overall level than the same sector in the UK. Given that the more sophisticated clients will be more aware of their contractual rights and duties than the Irish homeowner clients, those (more sophisticated clients) will be much less likely to agree to verbal modifications than the Irish clients. Accordingly, the principles developed in *Williams v Roffey Brothers and Nicholls (Contractors) Ltd* 356 are of greater relevance in an Irish context, given the increase relatively likelihood of such verbally-made modifications being agreed to.

The problems this case has created, in an Irish context, are that the circumstances which led to this case (verbally-made modification to a construction contract), are actually much more conceivable in an Irish context than in a UK context. This means that, while in the UK the case may have little relevance, in Ireland, the case resonates much more heavily due to the less formal nature of the Irish housing construction sector; due to the high instance of one-off housing relative to all house building, and hence contains significant potential for such disputes.

It would be of value to the Irish construction industry to clarify this position definitively.

4.3. Attributes of Consideration I: The pre-existing contractual duty rule

The pre-existing contractual duty rule holds that where a party has agreed to do something, there is no fresh consideration provided by that party if a revised agreement requires them to do no more that that which they originally agreed to do. They are bound by their original agreement and the revised agreement is not enforceable. *Stilk v Myrick*[^357] is generally held as the authority on the pre-existing duty rule. That is to say, until *Williams v Roffey Brothers and Nicholls (Contractors) Ltd*,[^358] *Stilk v Myrick*[^359] was considered to satisfactorily answer the question as to whether the performance of a pre-existing contractual duty owed to the promisor is good consideration for an additional promise of payment made by the promisor.

In *Stilk v Myrick*,[^360] the plaintiff merchant seaman agreed to crew the ship for a return voyage from England to the Baltic Sea in return for a fee of £5. Upon arrival at the Baltic Sea port, some of the crewmen deserted, and the master of the ship, faced with crew shortage and a vessel to return, agreed to pay the remaining seamen an additional sum (comprising a share of the deserted men’s wages) to crew the ship home. Upon returning to the home port of London where the seamen would be discharged upon satisfactory completion of a return voyage, the defendant refused to pay the additional premium, holding that the remaining sailors had merely discharged their pre-existing duty and no more. The plaintiff

[^357]: (1809) 170 ER 851.
[^359]: (1809) 170 ER 851.
[^360]: (1809) 170 ER 851.
brought a claim against the master of the ship to recover the wages which he felt were due to him, but the claim failed.

In his judgment, Lord Ellenborough\(^{361}\) held that when the sailors signed up for the voyage, they signed up for the entire, return trip, and not a one-way journey to the Baltic with the return leg to be re-negotiated thence. More importantly though, it was his belief that the seamen agreed to do all the work the situation required them to do in order to return the vessel to London; thereby implying that the desertion of the men was a situation which required an appropriate response from the remaining seamen without warranting additional payment. The second report by Campbell\(^{362}\) also supports this decision, where Lord Ellenborough is reported to have ruled that the agreement is “void for want of consideration,” since the sailors “had undertaken to do all that they could under all the emergencies of the voyage”. He concludes then that “the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port.”\(^{363}\)

Since it was held in *Stilk v Myrick*\(^{364}\) that the additional agreement was void for want of consideration, it is worth examining how this agreement might have had consideration, when looked through the lens of the more recent case of *Williams v Roffey Brothers and Nicholls (Contractors) Ltd*\(^{365}\). In the same way that a

\(^{361}\) *Stilk v Myrick* (1809) 6 Esp 129.

\(^{362}\) *Stilk v Myrick* (1809) 2 Camp 318. See also Peter Luther, ‘Campbell, Espinasse and the sailors: text and context in the common law,’ (1999) 19 Legal Studies 526-551, where it is noted that this case “provides a famous example of conflicting reports: one reporter appears to base the judgment on the doctrine of consideration, the other on public policy. The view that the case turned on the application of the doctrine of consideration had been generally accepted, but was challenged in *Williams v Roffey Bros. & Nicholls (Contractors) Ltd* [1991] I QB1.”

\(^{363}\) *Stilk v Myrick* (1809) 2 Camp 318.

\(^{364}\) (1809) 6 Esp 129.

contractor who is awarded a contract for the construction of a new building, whose accepted tender is based upon a sub-contractor’s price of €1m, is not contractually obliged to pay the subcontractor €1.1, even though he subsequently agrees to do so, since no consideration is deemed to exist, as nothing of value is exchanged for the additional €0.1m. Though this may be true in the conventional analysis of consideration, Williams v Roffey Brothers and Nicholls (Contractors) Ltd\textsuperscript{366} may have changed how consideration in this example could be deemed to be sufficient for an agreement to be binding. Much has been written on Williams v Roffey Brothers and Nicholls (Contractors) Ltd,\textsuperscript{367} but for the purposes of clarity in this work, a brief synopsis of the background and findings is offered hereunder:

The case concerns the defendant, a building contractor, who entered into a contract with the plaintiff, to carry out carpentry works to a development of flats, for a price of £20,000. The plaintiff was paid £16,200 for part-completion of the works, and subsequently ran into financial difficulty. The defendant, in an attempt to avoid the invocation of a late-completion clause, and consequent liquidated damages claims from the client, agreed to pay the plaintiff an additional premium, of £575 per flat, to complete the outstanding joinery works, to an additional total of £10,300. The plaintiff carried out further work and was paid an additional £1,500. No further money was paid by the defendant, so the plaintiff abandoned the site. The defendant, urgently needing completion of carpentry works, employed an alternative subcontractor. The plaintiff then brought a claim against the defendants for outstanding sum of £10,847.

The background to this case is not an unusual scenario on a construction project, whereby a variation is ordered by the client, and additional payment is promised in return for the variation to the works. In this case, however, the variation to the

\textsuperscript{366} [1991] 1 QB 1.

\textsuperscript{367} Ibid.
works, was in fact, that the works should be completed by the original completion date.

This cases raised the somewhat curious possibility that the consideration provided by the defendant could assume the form of “obviating a disbenefit” in the form of liquidated damages, and that such obviation did in fact constitute good consideration by being a form of “practical benefit.”

Varying views exist on the role played by consideration in this case, however there is some consensus that the decision in *Roffey* was an attempt by the courts to apply a degree of pragmatism to the role of consideration, and used it to achieve what the court regarded as a commercially acceptable solution.

In *Stilk v Myrick*, since the sailors were only doing what they agreed to do in the first place, there was no fresh consideration. They were merely discharging the contract as they had originally agreed to: they were providing no additional services. However, in a certain light, (as provided by *Williams v Roffey Brothers and Nicholls (Contractors) Ltd*), it is conceivable the sailors were providing consideration. Each had agreed to act as a crewman, to do a certain proportion of the work required to safely bring the ship from London to the Baltic and back to London again. When the men subsequently deserted, the remaining crew was required to bear an additional proportion of the work, since the same work was now expected to be carried out by fewer men. Lord Ellenborough’s view that the remaining men were dealing with an emergency of the voyage expected of them is understandable, if debatable, though one wonders if the judgment could have been the same had the majority of crewmen deserted. Would it then be reasonable to hold that only a minority of the crew was obliged sail the ship home

368 *Williams v Roffey Brothers and Nicholls (Contractors) Ltd* [1991] 1 QB 1.


370 (1809) 6 Esp 129.

without additional recompense? What if just one crewman had remained? Surely his single-handed crewing home of a large merchant vessel could not be considered as an uncompensable act of dealing with the exigencies of the voyage. Furthermore, the master of the ship surely received a “practical benefit” in the language of *Williams v Roffey Brothers and Nicholls (Contractors) Ltd*,\(^\text{372}\) in having his ship returned to London on time and available for its next voyage without delay, which would likely mean that if this case were to appear before the courts in more modern time, the judgment may indeed have been different. Such a view is supported by Glidewell LJ in his judgment on *Williams v Roffey Brothers and Nicholls (Contractors) Ltd*,\(^\text{373}\) suggesting that the case of *Stilk v Myrick*\(^\text{374}\) might be decided differently today.

Lord Ellenborough’s judgment appears thus to examine this case from the perspective of detriment to the crew, rather than benefit to the master. He arguably held that there was no additional detriment to the crew, since completing the return voyage was what each crewman had agreed to do in the first instance, regardless of situations which may arise during the voyage. Again one wonders as to how many deserters warrant the remaining sailor(s) doing more than what was agreed at the start of the voyage. In failing to use the approach since adopted in *Williams v. Roffey Brothers and Nicholls (Contractors) Ltd*\(^\text{375}\) of examining the benefit to the master or ship owner, which clearly accrued if viewed in the same light as that case, it is in marked contrast then to the “practical benefit” which was held in *Williams v. Roffey Brothers and Nicholls (Contractors) Ltd*\(^\text{376}\) to form good consideration.

\(^{372}\) [1991] 1 QB 1. The concept of “practical benefit” will be discussed more fully later in this chapter.

\(^{373}\) Ibid.

\(^{374}\) (1809) 6 Esp 129.


\(^{376}\) Ibid.
It is worth noting and remembering though that these two cases are separated by some 182 years, and that public policy issues would certainly have been much different at both times. It is thought by some\textsuperscript{377} that Lord Ellenborough’s judgment is partly reflective of the prevailing contemporary culture, where much of England’s wealth and power at that time was directly owing to her ability to maintain a strong merchant fleet, and any threat to that \textit{status quo} might in turn weaken England’s ability to trade effectively internationally, and hence diminish her global dominance. However, such public policy considerations have never been admitted, and it is noted that subsequent cases (prior to \textit{Williams v Roffey Brothers and Nicholls (Contractors) Ltd}\textsuperscript{378}) are accepted on the basis of the men having provided no consideration, by doing only what they were already bound to do.

If indeed the public policy were more prevalent, and the sailors refused to complete the voyage without additional payment (though this has never been suggested), then the impact of such an agreement may be voided by virtue of having done so as a result of inappropriate pressure.\textsuperscript{379} Where such refusal does amount to duress, a promise induced by it can be avoided (and money paid in order to entice performance can be recovered) on that ground.\textsuperscript{380}

Hooley offers some interesting clarity on the difference between encouraging performance and being extorted into paying more when completing pre-existing duties:

\begin{quote}
“\textit{If A and B genuinely and reasonably wish to renegotiate their contract such contractual modification may fail for want of consideration just as much as if A had extorted it. To avoid such injustice general exceptions have been grafted into}
\end{quote}


\textsuperscript{378} [1991] 1 QB 1.

\textsuperscript{379} Duress will be discussed in the next chapter.

the basic prohibitive rules. However, such exceptions remain open to abuse by the extortionist and may be unknown to the parties to an innocent renegotiation. The result has been a mishmash of exceptions to a rule which ignores the commercial benefits of a genuine renegotiation, is open to ridicule and cries out for reform … But what if the promisor has other reason to believe that the promisee will not complete his contractual obligations? The defendants in Williams v. Roffey and the captain in Stilk v. Myrick, at the very least, required reassurance that existing duties would be performed. The promise of extra pay is then an inducement to perform and not the result of extortion.”

The key distinction that this point raises is between the genuine cases requiring an inducement to perform, and the builder who is attempting to extort the homeowner by refusing to complete a half-finished house extension unless additional money is promised. Part of this difference relates to the normal degree of fortitude (which is discussed in the next chapter) expected of a person operating in the industry, and certainly an elderly couple procuring a extension to their home is unlikely to be a sophisticated operator relative to other organisations operating in the construction industry. However, the levels to which that fact would provide a defence is uncertain, since it is not unreasonable that the elderly couple should also procure the services of a suitable construction professional (an engineer or an architect) to act as their agent for the project. This is consistent with Blair and Hird:

“This does not alter the reality that it is reasonable for the courts to assume that those in business ought to be conversant with the legal framework within which they operate and ought to take reasonable steps to protect themselves from sharp operators.”

Therefore the distinction between inducement to perform and extortion must be seen in the correct context of the norms of the industry, as will be discussed more


fully in the next chapter on duress. *Stilk v Myrick*\(^{383}\) is interesting to compare with the Canadian Court of Appeal case of *Smith v Dawson*.\(^{384}\) In the latter case, the plaintiff contractor agreed to construct a house for a fixed price for the appellant. As the house neared completion, the building was partially destroyed by fire. The plaintiff remained liable under the contract to complete the construction of the project, but refused to do so unless insurance money was paid to it by the appellant, since the plaintiff did not have its own insurance. The appellant reluctantly agreed to pay the insurance money to the plaintiff, but later refused to hand over the money. The subsequent appeal decided that giving up the right to abandon a contract was not good consideration for the appellant’s promise to pay the insurance money, and that, as a consequence, there was no enforceable agreement to do so. *Smith v Dawson*\(^{385}\) therefore supports the notion exemplified by *Stilk v Myrick*\(^{386}\) that performing an existing contract by one party does not constitute good consideration for a new promise made by the other party. A noteworthy exception to the pre-existing contract rule is the area of mutual rescission. *Raggow v Scougall & Co*\(^{387}\) provides good authority in this aspect of contract law. In this case, the plaintiff employee entered into a two-year contract with the defendant employer at a certain salary, prior to the commencement of The Great War (First World War, 1914-1918). With the onset of war, the defendant’s business declined, manifesting in falling orders, and the defendant considered closing the business down completely. An agreement was reached between the employer and employees. This agreement stated that the employees would work for a reduced salary, with a return to the previous rates after the war, and the employer agreed to keep the business running. The plaintiff (one of the employees) brought an action against the employer for the difference in wages.

\(^{383}\) (1809) 6 Esp 129.

\(^{384}\) (1923) 53 OLR 615 (CA).

\(^{385}\) (1923) 53 OLR 615 (CA).

\(^{386}\) (1809) 6 Esp 129.

\(^{387}\) (1915) 31 TLR 564 (Div Ct).
since there was no fresh consideration on the part of the defendants to support the new agreement. Essentially, the issue in this case was much as in *Stilk v Myrick* insofar as the matter in question was whether there was consideration for the defendant to accept less money for the same job. In *Stilk v Myrick* the question was whether there was consideration in performing the agreed job for more money; in *Raggow v Scougall & Co* the question was whether there was consideration in performing the agreed job in return for less money. In both cases the employer was getting the same services from the employees. As already mentioned above, *Stilk v Myrick* found that there was no fresh consideration since the employee was merely performing the role which he had previously agreed to, but in *Raggow v Scougall & Co* it was held that where parties have agreed to a mutual rescission of the prior agreement and the substitution of a new agreement, the new agreement is binding.

This raises the interesting point when considered in a construction context: just how much variation can be instructed within the scope of a contract before the modified contract is considered a new contract? This is especially important where a contractor has agreed to do a type of work for a certain unit price, based on the quantities available at the time of tendering. If, for example, a contractor gives a rate of €10 per square metre for 100 square metres of wall construction, is it reasonable to expect the contractor to absorb an instruction to do 1,000 square metres for the same rate? As previously referred to, contracts themselves provide good clarity here, giving precise amounts of variation from the original

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388 (1809) 6 Esp 129.

389 Ibid.

390 (1915) 31 TLR 564 (Div Ct).

391 (1809) 6 Esp 129.

392 (1915) 31 TLR 564 (Div Ct).

393 See *G.L.C. Construction Ltd. v. Laois County Council* [2005] IEHC 53 where the issue of pricing of variations was raised. See also *James Elliot Construction Ltd v Irish Asphalt Ltd* [2011] IEHC 269, and *Limerick City Council v Uniform Construction Ltd.* [2005] IEHC 347.
which a contractor can be instructed to do under the terms of the original contract. Clearly, it would be unreasonable to expect a dramatic change in quantities to be done for the same rate, given that the contractor would have priced based on the expected duration of the original quantity, with all the consequent effects of that piece of work. This is consistent with *Blue Circle Industries v Holland Dredging Co*,\(^{394}\) which was discussed earlier, which examines when work instructed is within or outside the main contract. In that case, it was determined that the work instructed was so different to the original work that it constituted a new contract rather than a modification to the existing contract, thereby removing the obligation from the contractor to agree to the instruction.\(^{395}\) Likewise, *Henry Boot Construction v Alston Combined Cycles*,\(^{396}\) also discussed earlier, demonstrates that there are limits to which the Contractor can be expected to modify his work without a change in the valuation.\(^{397}\)

\(^{394}\) (1987) 37 BLR 40.

\(^{395}\) See *Galway City Council v Samuel Kingston Construction Ltd & anor* [2010] IESC 18, where it was noted that “[T]here was … disagreement as to the terms of the agreement, the nature of the agreement, (and in particular whether it was a separate freestanding agreement, or rather an agreed variation of the [original] agreement), and indeed as to whether there was any binding agreement.”

\(^{396}\) [2000] BLR 247. This is an appeal on a question of law certified by Lloyd, J. It arises out of a construction contract dated 21\(^{st}\) March 1994, and concerns the correct method of valuing variations. The contract incorporated the ICE Standard Conditions of Contract, 6\(^{th}\) Edition. The question turns on the meaning of Clause 52(1), which covers valuation of ordered variations. The wording of the clause is as follows: “The value of all variations ordered by the Engineer in accordance with Clause 51 [Ordered Variations] shall be ascertained by the Engineer after consultation with the Contractor in accordance with the following principles. Where the work is of a similar character and executed under similar conditions to work priced in the Bill of Quantities it shall be valued at such rates and prices contained therein as may be applicable. Where work is not of a similar character or is not executed under similar conditions the rates and prices in the Bill of Quantities shall be used as the basis for the valuation so far as may be reasonable failing which a fair valuation shall be made. Failing agreement between the Engineer and the Contractor as to any rate or price to be applied in the valuation of any variation the Engineer shall determine the rate or price in accordance with the foregoing principles and he shall notify the Contractor accordingly.

\(^{397}\) Cf. *Mc Cabe Builders (Dublin) Ltd v Sagamu Developments Ltd & Ors* [2007] IEHC 391 where the contractor was not permitted to make changes under the specific form of contract in that instance.
suggests that the threshold of this limit centres around what is material to the contract. Furthermore, both of these suggest that specific clauses in construction contracts are sometimes of value in promoting such clarity without requiring wholesale changes to the general law of contract.

The primary difference between *Raggow v Scougall & Co* and *Stilk v Myrick* (as far as modification to contracts is concerned) is that in the former the court ruled that the parties “in fact had torn up the old agreement and made a new one by mutual consent.” In practical terms, the old contract was gone and a new one made, and the original contract cannot be recovered. The pre-existing duty under the original contract is therefore terminated.

The question of duress will be discussed in the next chapter in more depth, but since it is an integral component of some of the issues arising in this section, (as well as being of significance to the overall thesis), it is referred to here for the purposes of further enlightening the discussion on the existence or otherwise of

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398 [2012] IEHC 262. “A material variation was described as a change in the principal contract which alters the business effect of the relationship so as to vary the risk. A variation was material if it was one that a prudent person might take into consideration in deciding whether to enter a transaction. In that jurisdiction there is a presumption that all variations to the principal contract will be held to be material unless they are plainly insubstantial or necessarily beneficial to the surety.”

399 See also *O’Callaghan v Limerick City Council & Ors* [2012] IEHC 293 for useful clarity on the enforceability of a variation agreed by a person not fully authorised to do so under express terms of the contract.

400 For example, see *Fédération Internationale des Ingénieurs-Conseils* (International Federation of Consulting Engineers), *Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer* (*The Red Book*, FIDIC 1999). Clause 12 of this contract provides explicit guidance as to when the Contractor is entitled to new rates based on a change of quantities as instructed by the Client.

401 (1915) 31 TLR 564 (Div Ct).

402 (1809) 6 Esp 129.

403 *Raggow v Scougall & Co*. (1915) 31 TLR 564 (Div Ct).

404 See *Noreside Construction Ltd v Irish Asphalt Ltd* [2011] IEHC 364 on the necessity to establish the variation in agreed terms.
consideration. A question arises, as to whether Stilk v Myrick\(^{405}\) is really a classic example of economic duress rather than a consideration case. Does the captain actually have any alternatives other than to accede to the request to pay more money to the sailors, since they have the balance of power as to whether or not the ship returns home? More importantly, is the pressure applied by the sailors legitimate? A certain amount of extrapolation based on the reported facts of the case is required here, which is not considered to be entirely unreasonable based on the available information. If, as a starting point, we take a definition of economic duress as “the threat of such serious financial consequences as give the threatened party no practical choice but to enter into the contract,”\(^{406}\) then, on the face of it, it would seem to be a leap to say that the captain had options open to him other than to agree to pay extra to the remaining sailors to sail the ship home.

However, that view requires the introduction of some skepticism in order to challenge. For example, it could equally be said that the sailors themselves may not have felt they were placing the captain in an impossible position, and were merely requesting that which they felt was reasonably owing to them for what they might have felt was the additional work of bringing the ship home with fewer hands. That was the very reason that they brought the action in the first place. Certainly it would have meant longer watches with fewer rest periods on a voyage of several days. That they actually took this action (at the risk of personal loss, and considering their relative wealth and power against the shipping owner) gives an indicator of their state of mind. Upon examining the facts of the case, is it likely that they themselves realistically considered remaining in the port of Kronstadt, (though the reasons for the desertion of the initial group of sailors is unclear)? Furthermore (and notwithstanding that there was reported difficulty in replacing the deserters), considering that Kronstadt was (and is) a significant sea port, is it not likely that the captain would eventually have sourced replacement

\(^{405}\) (1809) 6 Esp 129.

sailors to take the places of the remaining crew had he wished not to agree to the additional payment? Therefore, the remaining sailors are likely to have wanted to return home, since a demand for additional payment using illegitimate pressure could fail if the captain decided to try harder to secure a new crew for the return voyage.

Without delving unnecessarily deeply into the area of duress, for the presence of duress, certain elements are required. Firstly, there must be pressure (in the form of either an unlawful or illegitimate threat) and, secondly, it must be the case that that pressure actually induced the contract. An unlawful threat which induces a contract voids that contract (or modification to that contract). Illegitimate pressure, while not unlawful, would have to be something unconscionable.\footnote{This will be discussed in more depth in the next chapter, but the reader’s indulgence is kindly requested at this point, since a basic outlining of duress is necessary to support the point being made.} For example, in \textit{The Port Caledonia}\footnote{[1903] P184.} in the context of a salvage operation, a refusal to rescue a vessel in distress or those on board except in extortionate terms has led to the resulting contract being set aside. It is argued here that the sailors were probably not employing illegitimate pressure in seeking to capitalise in an extortionate manner on the misfortune of their master, since they were merely seeking the redistribution of the actual planned crew costs amongst the fewer returning crew members. The extent to which they threatened not to complete the return voyage (which could be viewed as the unlawful act of breaching their contract) is uncertain but considered also unlikely under the circumstances.

While there are elements of possible economic duress in this case, it is held here that duress, in all likelihood, did not play a primary role in the circumstances.

A challenge for the construction industry and construction contracts arising from the above analysis, is that where contracts are modified for reasons (which are assumed to be commercial), and where there is no evidence of duress, the...
modification to the agreement will not be held enforceable unless there is consideration by both parties. Where parties are already in a commercial agreement, and agree (without duress) to modify their agreement, it seems curious that there would need to be fresh consideration in order to make that modification as enforceable as the main agreement itself. In a construction contract setting, (as has been referred to in previous chapters), changes are endemic as construction projects progress, and are a necessary reflection of the risk allocation and uncertainty of projects. Modifications are therefore required in order to deal with this during the lifetime of the project, and both parties are usually aware of this feature of construction projects. Is the fresh consideration requirement an unnecessary complication to effect modifications in such circumstances? This is a question which will be examined in more depth later in this thesis, but which is emphasised by the Canadian case of NAV Canada v. Greater Fredericton Airport Authority Inc409 (which will also be discussed in more detail in the next section on duress), though is of value to refer to here also. A key finding in that case was that the court was “prepared to recognise and adopt an ‘incremental’ change in the traditional rules by holding that a variation unsupported by consideration remains enforceable provided it was not procured under economic duress.”410 Such a finding is of key importance to this thesis in the context of the enforcement of verbally-made construction contract variations without fresh consideration.

The difficulty in reconciling Williams v Roffey Brothers and Nicholls (Contractors) Ltd411 with Stilk v Myrick412 continues, and many attempts have been made. Trietel413 refers to the important point that Williams v Roffey

409 [2008] 290 DLR (4th) 405

410 NAV Canada v. Greater Fredericton Airport Authority Inc. [2008] 290 DLR (4th) 405 at 7


412 (1809) 6 Esp 129.

413 Ibid.
Brothers and Nicholls (Contractors) Ltd\textsuperscript{414} did not over-rule Stilk v Myrick,\textsuperscript{415} but rather that Glidewell LJ described it as a “pillar stone of the law of contract”. Glidewell LJ, in his judgment on Williams v Roffey Brothers and Nicholls (Contractors) Ltd,\textsuperscript{416} states that the case is not founded on fraud or duress, but instead is precipitated on the principal of consideration. However, in making clear reference to Stilk v Myrick,\textsuperscript{417} and in particular that such a finding may be viewed to contravene Stilk v Myrick,\textsuperscript{418} he proceeds to state that he holds the view that such propositions “do not; they refine, and limit the application of that principle, but they leave the principle unscathed.”

Purchas LJ in his judgment again makes reference to Stilk v Myrick,\textsuperscript{419} and holds that:

“[T]he rule in Stilk \textit{v} Myrick \textsuperscript{156} ... remains as valid as a matter of principle, namely that a contract not under seal must be supported by consideration. Thus, where the agreement upon which reliance is placed provides that an extra payment is to be made for work to be done by the payee which he is already obliged to perform then unless some other consideration is detached to support the agreement to pay the extra sum that agreement will not be enforceable.”

Russell LJ in his judgment, merely states of Stilk v Myrick\textsuperscript{420} that he does not believe at the time of Williams v Roffey Brothers and Nicholls (Contractors) Ltd\textsuperscript{421} that “the rigid approach to the concept of consideration to be found in Stilk

\textsuperscript{414} (1809) 6 Esp 129.
\textsuperscript{415} Ibid.
\textsuperscript{416} Ibid.
\textsuperscript{417} Ibid.
\textsuperscript{418} Stilk v Myrick (1809) 6 Esp 129.
\textsuperscript{419} Ibid.
\textsuperscript{420} Stilk v Myrick (1809) 6 Esp 129.
\textsuperscript{421} [1991] 1 QB 1.
... is either necessary or desirable”, since “the policy of law in its search to do justice between the parties has developed considerably since the early 19th century” when *Stilk v Myrick*\(^{422}\) was decided.

Russell LJ goes on to state, importantly, that:

> “Consideration there must be, but in my judgment, the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflects the true intention of the parties.”

Such a statement by Russell LJ has led to considerable debate over the notion of invented consideration. Trietel’s\(^ {423}\) albeit tentative conclusion from these judgments, and in particular Russell LJ findings, is that “the factual benefit to B in securing A’s performance of the earlier contract will normally suffice to constitute consideration.” Indeed, the subheading used by Trietel is hardly likely to dissuade contentious opinion, being somewhat radical in itself: “Cases in which there was no consideration.” Of course, this view held by Trietel is somewhat abhorrent to Atiyah,\(^ {424}\) who is bewildered that someone who is such a distinguished interpreter of modern law of contract could possibly be “driven” to admit that the courts can “invent” consideration, and still remain an orthodox interpreter of contract law. Knight is even more critical in terms of the effect of diminishing the explicitness of the understanding of consideration:

> “[T]he most powerful argument against *Roffey* is its failure to accord with the reasonable expectations of contracting parties. The reasonable expectation is that one gets nothing for free, otherwise known as the bargaining principle. Let us be very clear on this point: the claimants in *Roffey*, Dr. Foakes and Mr. Stilk’s widow, had they succeeded, would have been awarded something for nothing. They did

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\(^{422}\) (1809) 6 Esp 129.


nothing other than fulfil what they were already contracted to do. Roffey is not only a damaging decision for the law of contract in that it creates confusion and contradiction, but dangerous because the fundamental idea of contract, that those who contract should perform their contractual duties or be made to pay for it, has essentially been swept away."425

Atiyah queries this concept of invention in a rather philosophical manner, yet yields an interesting conundrum which lies within the question. Atiyah wonders if invented consideration is the same as “real” consideration, because if it is, then in what way is it “invented”? If it is not the same thing, then “it either violates the rules of law, or it modifies them”. Since it is unlikely that the learned judges in Williams v Roffey Brothers and Nicholls (Contractors) Ltd426 intended to violate the law, then one must suppose, to take Atiyah’s line of reasoning, that the “invented” consideration was intended to modify the law, and hence is not “invented” but in fact “real” in a modified doctrine of consideration in this context. Atiyah concludes:

“They [the judges in Williams v Roffey] have no power to invent a consideration in one case and refuse to do so in a relatively identical case. Thus an invented consideration must in the end be the same thing as an ordinary consideration.”

According to Blair and Hird:

“Consideration is a legal formality, as is its alternative; a deed. Nominal consideration therefore serves a symbolic function. It tells the courts whether there is a promise to be enforced, or not.”427


426 Ibid.

Consideration therefore acts as an indicator, by virtue of its presence, of a contract which is intended by its parties to be enforced. This point is somewhat echoed by Zhi Xuan Koo, which maintains that consideration should not be required, but that its presence should act as an indicator of intent as opposed to a decisive reason for enforcement, in the context of such a change being resolved by judicial action.

In an earlier piece of work, Reiter also highlights the nature of consideration as being primarily about reasons to enforce the promise, and goes further to propose that consideration and reasons for enforcement are one and the same:

“To the extent that the orthodox doctrine ‘serves well and is not out of joint,’ a judge’s ultimate decision to enforce or not will be the same whether he asks ‘Is there consideration?’ or ‘Are there sufficiently strong reasons for enforcing this promise?’ And, I suggest, in the vast majority of cases, orthodox doctrine and the independent policy consideration which encourage non-enforcement travel parallel paths: there is only ‘no consideration’ where, quite apart from problems of lack of consideration there are good reasons not to enforce the promise.”

However, the wider implications of the existence of invented consideration, either in the invented sense, or in the modification of the doctrine to become real, raises interesting questions about the value of the doctrine in the law of contract. The problem is that, as the law currently stands, the courts are placed in difficulty when attempting to enforce an agreement where consideration is not readily available:

428 See Airscape Ltd v Heaslon Properties Ltd [2008] IEHC 82 as an example where necessity for this evidentiary function is required. See also O’Stodhachain v O’Mahony [2002] IEHC 107.

429 Zhi Xuan Koo, ‘Envisioning the Judicial Abolition of the Doctrine of Consideration in Singapore,’ (2011) 23 SAcLJ 463-503. See also sections 6.3 and 8.5.


“Herein arises the prime difficulty in modification agreements: failure by the parties to make changes on both sides at the time of the modification may cause the agreement, honestly concluded, to be declared unenforceable for lack of consideration.”

If the courts have the ability to “invent” consideration where common wisdom may have felt it did not exist, then it arguably becomes a device to recognise parties’ obligations to each other, and is somewhat at odds with the traditional perception of consideration being something of value to demonstrate a party’s intention to become legally bound to another. Consideration then may be used as a mechanism to recognise an obligation where the courts feel it exists, notwithstanding the fact that a party may be discharging pre-existing contractual duties or other situations where the courts feel the intention of the parties was to become legally bound. Or, in the words of Chen-Wishart:

“[B]argain consideration has had to be ‘invented’ where it is lacking to justify enforcement ... It cannot disguise the fact that practical benefit neither confers any enforceable benefit additional to that contained in the original contract, nor buys any enforceable expectation to the reciprocal promise to pay more. Like the emperor’s new clothes, the benefit described as ‘practical’ turns out to be a lot less than presented. The words ‘illusory’ and ‘naked’ would not be inapt.”

However, it is important to remember that a strict analysis of the judgment of Williams v. Roffey Brothers and Nicholls (Contractors) Ltd yields nothing unconventional in terms of the requirements for the enforceable contract modification: the requirement is for consideration to be present, and consideration is found to have been present. Therefore, discussion about the nature of the consideration aside, Williams v. Roffey Brothers and Nicholls


434 Ibid.
(Contractors) Ltd\textsuperscript{435} merely demonstrates that the strict criteria for the enforcement of variations to existing contracts include, as with the formation of contracts, consideration (amongst others). That the courts had to take an unorthodox approach to the finding of that consideration is of immensely more interest, since the more pertinent question for this thesis is whether the requirement to establish the presence of consideration for the modification of existing contracts is appropriate in a construction context. To refer again to the briefly-mentioned case of NAV Canada v. Greater Fredericton Airport Authority Inc,\textsuperscript{436} (which will be discussed in more detail in subsection 4.5.1), it is observed that the approach there was to avoid inventing consideration, and instead to conclude that the more important requirement for enforcement was the absence of duress rather than the presence of consideration.

In practical terms, and as a slight aside, but as a useful closing illustration to question the necessity to provide consideration in verbal contracts, but not in deeds, a difficulty is presented. This difficulty means that one must question the relevance of making what is really just an arbitrary distinction between the verbal and written word. This difficulty is especially the case in today’s environment. While it is not doubted that the occasion which must have attached to two parties sitting down and going to the trouble of reducing their agreement to paper represented an event of some formality: which in itself demonstrated an intention to be bound by an enforceable agreement, or that the actuality of sitting down and signing something represents, for most people, a chilling effect which enables them to pause before agreeing to something which they know they will be bound by:

\textquotequote{
Why should a signed written promise be the equivalent of consideration in any situation? Historically the analogy of the sealed instrument was influential:
}


\textsuperscript{436} [2008] 290 DLR (4th) 405.
abolish the seal and what is left is a signed writing. This analogy is today, however, quite imperfect, because writing is almost as casual a mode of expression as speech, and ‘signed writing’ may be taken to include a letter between relatives or friends. The sealing of an instrument must have been, at least in the early days when obligors could not read, a solemn occasion.”

Bear in mind that this questioning (above) by Patterson was written some 56 years ago: long before the instant communication and internet age we now live in. It was before text messages became a prevalent means of communication; long before Twitter, Facebook, LinkedIn and the myriad other social networks became almost preferred means of communication amongst large groups of people; and certainly before the current era of Building Information Modelling (BIM) where much (including the trivial and minor) communication is carried out in written format online. Is this really the ‘solemn occasion’ envisaged whereby the seal was replaced by the significant formality of the written word? Is is likely that the fact that now much of what would previously have only have been communicated verbally is communicated electronically by text, thus blurs the lines between verbal and written agreements. A simple (though likely) scenario could involve a proposed modification to construction contract where the contractor and the client’s representative discuss the issue in person on site, subsequently review the documentation on a BIM model back in their respective offices, and later attempt to conclude the discussion by telephone, but could not because one person is out of coverage, so therefore conclude that discussion via text messages. Assuming the text messages are not sent in the spirit of formality envisaged by the seal, and are instead sent as casual means of communicating, does the law view this correspondence as leading to anything less enforceable than had the two construction professionals sat down and had the media present to witness the signing of an important contract? That the law even makes such a distinction raises concerns about the relevance of this doctrine in modern construction

contracts, where, in many ways, such a requirement does not run consistent with the idea of commercial efficacy.

4.4. Attributes of Consideration II: Consideration must be of some economic value

To refer again to Blair and Hird:

“Nominal consideration … serves a symbolic function. It tells the courts whether there is a promise to be enforced, or not. The function of a peppercorn rent or the payment of a shilling for an item is easily understood, by lawyers at least. It may be that an unsupported promise is morally binding, and even that it was intended to be legally binding, but the courts have insisted on some external sign of this intention before the promise will be enforced at law.”

Conventional contract theory and understanding holds that consideration must be of some economic value; in other words it “may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other,” or as more commonly referred to: something of value in the eyes of the law.

For consideration to be of some value is sufficient, even if the value itself is impossible to determine, but it must be of economic value, thus rendering such considerations as “natural affection” insufficient to satisfy the requirement for consideration as holding economic value. Natural affection and other likewise tokens may have value in the broader sense of the word, but since the law is only concerned with whether or not bargains are to be enforced on the basis of commercial transactions, the prerequisite of economic value is thus required.


439 Currie v Misa (1875) LR 10 Ex 153.
Consequently, the emergence of what has been termed illusory consideration has caused much discussion regarding its validity. Once again, conventional understanding of consideration refers to it in the context of supporting a bargain element of a contract. However, a significant redefinition has occurred with Williams v Roffey Brothers and Nicholls (Contractors) Ltd.  

Before looking further into the above case, it is worth reflecting on the aspect of consideration that requires it to be of some economic value. If only of some economic value, and not a fair or market-based value, then what is its purpose in this context? The importance of Williams v Roffey Brothers and Nicholls (Contractors) Ltd lies in the findings of the court that the defendant obtained an additional benefit from having the plaintiff agree to complete the works and perform his existing contractual duty. The debate which has since ensued challenges how performing an existing contractual obligation can possibly constitute good consideration. Chen-Wishart is particularly forceful on this case, stating that in order to maintain the enforcement of the bargain in this case, that “bargain consideration has had to be ‘invented’ where it is lacking to justify enforcement.” Cause for such a statement is not difficult to locate in the case, and is evidenced by a number of comments in the judgments. Of some interest is the observation by Purchas LJ that the plaintiff could be said to have provided consideration in that he did not break his contract with the defendants. A peculiar statement, which prima facie can be understood to mean that merely discharging one’s obligations in a contract is sufficient consideration to warrant a change in terms. This observation, if applied universally, could essentially mean that where a party were to suffer a detriment if the party with which they are in contract with fails to carry out an activity which both parties agreed would be done, then for the
latter party to now complete that activity would warrant additional payment from
the former party. Surely such an application of consideration could render any
commercial contract open to renegotiation should one party have sufficient hold
over the other.

However, by contrast with the American perspective, a contract obligation
entitles a party to elect either to undertake the agreement, or break the agreement
and pay damages. As described by Holmes,\textsuperscript{443} the options available are to keep
the agreement, or, in the event of breach, to sue the breaching party for breaking
the contract:

“The only universal consequence of a legally binding promise is, that the law
makes the promisor pay damages if the promised event does not come to pass. In
every case it leaves him free from interference until the time for fulfilment has
gone by, and therefore free to break his contract if he chooses.”\textsuperscript{444}

There is therefore an argument that where a choice is elicited by one party for the
other party to only undertake that which was agreed, this could in itself constitute
consideration in the sense of forbearing to commit something which they are
entitled to do. As this is not the case in English or Irish law, its seems curious
that Purchas, LJ would make such a remark.

The essay by Chen-Wishart\textsuperscript{445} on this subject is so-named because of what that
author feels is the illusory nature of the consideration deemed to exist in Williams

\textsuperscript{443} Oliver Wendell Holmes Jr, The Common Law, (originally published 1881) (Re-typset edition:
Paulo JS Pereira and Diego M Beltran (eds), University of Toronto Law School Typographical
September 2013.

\textsuperscript{444} Ibid. at 266.

\textsuperscript{445} Mindy Chen-Wishart,'Consideration: Practical Benefit and the Emperor’s New Clothes,’ in J
Beatson and D Friedmann (eds), Good Faith and Fault in Contract Law (Clarendon Paperbacks
1995).
In his judgment, Glidewell LJ summarised the key findings of the case, as follows (emphasis added):

(i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A’s promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B’s promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B’s promise, so that the promise will be legally binding.

The practical benefits which the court found accrued to the plaintiff were, using Chen-Wishart as a starting point:

1. The plaintiff’s continued performance in completing the works as originally agreed;
2. The avoidance of the trouble and expense of obtaining a substitute joinery sub-contractor, and the likely additional cost or difficulty of a new sub-contractor integrating his work with the plaintiff’s work;
3. The avoidance of the invocation of the penalty payment in the guise of liquidated damages payments for late completion under the main contract; and
4. The creation and implementation of a more formalised payments schedule and system to the plaintiff, which resulted in a more efficient performance by the plaintiff (albeit for a limited period only)

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447 Ibid.

Chen-Wishart, contrary to Glidewell LJ above, does not accept that the foregoing constitute consideration in the legal sense, and holds that they certainly would not have been seen as consideration prior to Williams v. Roffey Brothers and Nicholls (Contractors) Ltd. The first two benefits, according to Chen-Wishart, were merely reflective of what the defendant was entitled to under the original contract; the third benefit was consequent on the first two in any event; and the fourth benefit is difficult to see as being a practical benefit merely by the plaintiff accepting a payment schedule.

As mentioned previously, Williams v Roffey Brothers and Nicholls (Contractors) Ltd is, on principle, uncontroversial and in accordance with Stilk v Myrick, in that it is not good consideration to promise to perform that which one was already committed to perform unless there is fresh consideration. What actually constitutes fresh consideration is given an expanded meaning in Williams v Roffey Brothers and Nicholls (Contractors) Ltd, to cover “practical benefit,” and that is the source of disagreement between the main views in this area. Of the four areas listed by Chen-Wishart above, the fourth is possibly too readily dismissed. It is worth questioning whether item 4 on that list could be classified as consideration in the classical sense: if it is something which was not originally bargained for and which is capable of being valued in money or money’s worth. Remembering that the sufficiency of consideration is irrelevant (once it is of economic value), it is held to be entirely possible firstly that a definite payment schedule is different from an ad hoc payment schedule, and secondly that a definite payment schedule, where it is agreed that payments will be made in accordance with a distinct timetable is worth something more than a payment schedule which permits payment at will until a specific date. Elements of


\[450\] Ibid.

\[451\] (1809) 6 Esp 129.

Pinnel’s Case\textsuperscript{453} also offer some support for this view (although in a different context), where it was held that a change to the payment terms (such as the location of making a payment) could form good consideration for paying less than the complete sum in fulfilment of a debt. Therefore it is possible to determine that consideration in the classical sense of economic benefit is present in this case, and the finding of an enforceable contract through the presence of “practical benefit” may not have been entirely necessary.

An alternative view is postulated by Chen-Wishart’s later work,\textsuperscript{454} whereby she furthers the position which was earlier espoused. In particular, she modifies her view that the practical benefit found in \textit{Williams v Roffey Brothers and Nicholls (Contractors) Ltd}\textsuperscript{455} did not constitute good consideration, but that it could do so, when examined in a certain light. Chen-Wishart’s modified view is that there is a fundamental difference between a right to contractual performance and actual receipt of performance. It is this difference, which leads to the title of her essay, that a bird in the hand is worth more than one in the bush. Indeed, this is exemplified by the “practice of selling debts at a discount on their face value,” since, doubtless, if there was no difference between the two, then they should surely carry the same price. The caveat, however, that any additional or subtraction of contract should be enforceable, is provided “the promisor receives the stipulated bird in the hand.”\textsuperscript{456}

Chen-Wishart notes that the current “eye of the law” approach views “a ‘contract right’ as the ‘right to contractual performance’ and this, in turn is equated with the

\footnotesize
\textsuperscript{453} (1601) 5 Co Rep 117a. See Section 4.4 on Promissory Estoppel.


\textsuperscript{455} [1991] 1 QB 1.

‘receipt of performance.’"457 Under this approach, the promisor gets nothing more when he receives the object of the contract than he already had when he had the right to the object of the contract. The preferable approach is an “eye of the parties” one, since, from the parties’ perspective, there may well be a benefit in actual receipt, rather than promised receipt, of said “bird.” Such was the case in Williams v Roffey Brothers and Nicholls (Contractors) Ltd,458 where the actual performance of the contract constituted a benefit to the parties. The alternative of finding a suitable replacement to complete the works, compensable under a contract action, could well be illogical since obtaining actual performance “will often be more valuable than simply the right to sue for non-performance.”459 She therefore opens up the notion that, as a result of an analysis of Williams v Roffey Brothers and Nicholls (Contractors) Ltd,460 it is possible to bargain for actual performance.

This is an interesting notion, which, on one hand rationalises Williams v Roffey Brothers and Nicholls (Contractors) Ltd,461 but at the same time creates further uncertainty about the role of consideration. If it is possible for an enforceable modification to a contract, where the parties did not provide fresh consideration (in the traditional sense), because the re-bargain pertained to actual performance, then once again, it is difficult to think of circumstances where such a re-bargain could not occur. Interestingly, Chen-Wishart is clear in her determination that, whatever is in place to affirm a modification (such as consideration), the “concern to prevent opportunist exploitation by the promisee properly belongs, to be resolved under the rubric of duress.” Consideration is about contract


461 Ibid.
formation and intention to be bound, as opposed to dealing with “the question of vitiation.” The importance of duress in the resolution of this problem will be analysed in the next chapter.

4.5. Promissory estoppel

While consideration has been examined in the preceding sections, there are alternatives to consideration in the discharge or modification of contracts. The equitable principle of promissory estoppel is one such that is worth concentrating on in this thesis. Promissory estoppel is but one component of the wider principle of estoppel, but for the purposes of the objectives of this study, only promissory estoppel will be investigated in detail.

The general rule that payment of a lessor sum is not discharge of a greater sum was first established in the above-mentioned Pinnel’s Case, in 1602. In this case, an action was brought for payment of the complete sum owed, and the law confirmed that the complete sum was owed, unless the balance was somehow bridged. Payment of a less sum on the day in satisfaction of a greater cannot be any satisfaction for the whole. Conversely, a change to the payment terms, (such as early part-payment, or payment at a different location to that agreed) may be in satisfaction of the whole. This is reported as follows:

“If I am bound in 201 to pay you 101 at Westminster and you request me to pay you 51 at the day at York, and you will accept it in full satisfaction of the whole 101 it is good satisfaction for the whole: for the expenses to pay it at York, is sufficient satisfaction.”


463 (1601) 5 Co Rep 117a
Thus a promise made without consideration is generally not enforceable, as discussed in the previous section on consideration. Promissory estoppel is not an exception to this rule, but rather a complementary principle to prevent inequitable situations from arising, in circumstances where no consideration could be construed to exist to affirm a contract to prevent the unfairness from occurring. Promissory estoppel, as first developed in *Thomas Hughes v The Directors & C of the Metropolitan Railway Co*, where the appellant Railway Company, a lessee of the respondent landlord Mr Hughes, succeeding in winning relief from ejection from their premises which the lessor had sought based upon the lessee not completing repairs within the required six-month notice period, even though discussions had been underway between the parties regarding the possible sale of the property. The landlord was successful at first instance, but on appeal the House of Lords determined that the lessee was entitled in equity to be relieved against the forfeiture, since the communication regarding the possible sale had the effect of suspending the repair notice. Lord Cairns, the Lord Chancellor, in delivering the lead judgment, captured the essence of the doctrine as follows:

“[I]t is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture - afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have those taken place between the parties. My Lords, I repeat that I attribute to the Appellant no intention here to take advantage of, to lay a trap for, or to lull into false security those with whom he was dealing; but it appears to me that both parties by entering upon the negotiation which they entered upon, made it an inequitable thing that the exact period of six months dating from the month of

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464 (1877) 2 App Cas 439.

465 *Thomas Hughes v The Directors & C. of the Metropolitan Railway Co* (1877) 2 App Cas 439 at 448.
October should afterwards be measured out as against the Respondents as the period during which the repairs must be executed.”

The above case was later relied upon by Lord Denning in *Central London Property Trust Ltd v High Trees House Ltd.* This post-war London case concerned an action in debt by a landlord company against a tenant company seeking a year’s arrears of rent in respect of a block of flats rented during the war years. The arrears sought were based on the rent payable under the originally agreed lease, but the landlord had agreed to reduce the rent from 1941 because of the difficulty in finding tenants during the latter war years. In reference to *Thomas Hughes v The Directors & C of the Metropolitan Railway Co* in his judgment, Lord Denning, stated that it affords:

“[A] sufficient basis for saying that a party would not be allowed in equity to go back on such a promise. In my opinion, the time has now come for the validity of such a promise to be recognised. The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of the law and equity leads to this result, so much the better.”

However, in the instant case of *Central London Property Trust Ltd v High Trees House Ltd,* having stated the rule for promissory estoppel above, Lord Denning concluded that the plaintiff was in a position to demand the increased rent from 1945, provided that it gave adequate notice to the tenant. The date of 1945 is importance, since, as it marks the end of the war, it therefore marks the end of the circumstances which resulted in the rent being reduced in the first place: “when the flats became fully let, early in 1945, the reduction ceased to apply.” This case

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466 [1947] KB 130.

467 (1877) 2 App Cas 439.


469 [1947] KB 130.
has certain resonances with *Raggow v Scougall & Co*,\(^{470}\) where public policy issues relating to behaviour in times of national emergency are likely to have been prevalent.

Where this judgment has particular importance is in Lord Denning’s contention that had the action been for rent arrears over the entire period of 1941 to 1945, it would have failed due to estoppel, and that the promise to accept less rent during that period prevailed because it was relied upon and was binding despite the lack of consideration.

It is not intended here to describe in depth the basics of promissory estoppel, however for clarity, the main elements of promissory estoppel are established on the basis of the foregoing, and synopsised by Andrews\(^{471}\) and *Anson’s Law of Contract*:\(^{472}\)

1. There must be a clear and unambiguous representation, by words or conduct, regarding the past, present or future. This promise need not necessarily express, and may be implied from words or conduct.
2. The representee relies on this representation, and in some way altered his position in reliance on the promise made.
3. After this point, the representor can validly give reasonable notice of his wish to reassert his strict legal rights. Promissory estoppel only serves to suspend, and not to wholly extinguish, the existing obligation, once notice is given to do so.
4. Subject to point 3 above, the representor is estopped from acting inconsistently with his representation, and it must be inequitable for him to

\(^{470}\) (1915) 31 TLR 564 (Div Ct).


go back on the promise and insist on the strict legal rights under the contract.

5. The representee’s protection will be adjusted to the context that justice demands.

6. Promissory estoppel will not protect a representee if he has coerced, cheated exhibited any other form of bad faith in forcing the representor into making the statement.

It has also been established that promissory estoppel is not a cause of action. The principle is used to “obviate the necessity for consideration in cases where parties are already bound contractually one to the other and one of them promises to waive, modify or suspend its strict legal rights.” It is “a shield and not a sword,” in the words of Birkett LJ referred to by Denning LJ.

The relevance of this pertains to the necessity to provide fresh consideration in cases involving the modification of existing construction contracts. Promissory estoppel is a useful mechanism for the prevention of the vitiation of modifications to contracts (and the enforcement of the original contract) where there has been an element of reliance by one party on the modified contract, and it would now be unjust to insist on the performance of the original contract. Its relevance to construction contract modifications is in this capacity: where there is no consideration for the modification, then it is a mechanism for preventing that modification from being vitiated, provided that there has been reliance on the modification. It does not remove the necessity for consideration as such, since it cannot be used as a cause of action in itself to insist on enforceable agreements

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474 *Combe v Combe* [1951] 2 KB 215 at 224.

without consideration, and it can only be used as a defence against a claim of non-performance of the original contract.\textsuperscript{476}

A question raises at this point as to why \textit{Williams v Roffey Brothers and Nicholls (Contractors) Ltd}\textsuperscript{477} was not decided on the basis of promissory estoppel rather than the controversial “practical benefit” consideration principle. The answer is in three parts, and is provided by Purchas LJ in his judgment:

“It was suggested to us in argument that, since the development of the doctrine of promissory estoppel, it may well be possible for a person to whom a promise has been made, on which he has relied, to make an additional payment for services which he is in any event bound to render under and existing contract or by operation of law, to show that the promisor is estopped from claiming that there was no consideration for his promise. However, the application of the doctrine of promissory estoppel to facts such as those of the present case has not yet been fully developed … Moreover, this point was not argued in the court below, or was it more than adumbrated before us. Interesting though it is, no reliance can in my view be placed on this concept in the present case.”\textsuperscript{478}

Whether this is indeed the case will never be definitively confirmed, however given the relative newness and slow acceptance of the doctrine of estoppel, it seems at least possible that the court in this instance was content to decide on the matter at hand without delving into ground which was perhaps even less appealing to it than the route it actually took. Such an approach is curious to say the least, given that the court took the option of altering the understanding of consideration rather than using the albeit new, but ready-made, doctrine of promissory estoppel.

\footnotesize{\textsuperscript{476} Though it should be noted that, while not a cause of action in itself, promissory estoppel may be used as a counter-measure to a refutation of a claim under other grounds.}

\footnotesize{\textsuperscript{477} [1991] 1 QB 1.}

\footnotesize{\textsuperscript{478} \textit{Williams v Roffey Brothers and Nicholls (Contractors) Ltd} 1 QB 1.}
A further query raises regarding the rule in *Pinnel’s Case*,\(^{479}\) as to whether this can apply to *Williams v Roffey Brothers and Nicholls (Contractors) Ltd.*\(^{480}\) This question is answered by Arden LJ in *Collier v P & M J Wright (Holdings) Ltd.*,\(^{481}\) where she explained that the rule does not apply for the provision of services, including those categorised by *Williams v Roffey Brothers and Nicholls (Contractors) Ltd.*\(^{482}\)

“Where there was a compromise agreement the doctrine of promissory estoppel meant that the agreement was binding if it was inequitable for the creditor to enforce his strict legal rights. The Court of Appeal has also held that the rule does not apply where the debt arises from the provision of services,”\(^{483}\)

*Pinnel’s Case*\(^ {484}\) has caused practical problems; particularly where parties wish to agree to conclude their business by the part-payment of the outstanding debt. Arden LJ again:

“Needless to say, the rule in Pinnel’s case has proved very controversial. The effect of the rule is that it is not enough to give a creditor some only of the money to which he is already entitled. While that may sound like a good result in terms of creditor protection, the consequence is also that, where a compromise has been made, the expectations of the parties are frustrated. Thus, the rule makes it difficult to enter into compromises of claims, which it can often be commercially beneficial for both parties to do.”\(^ {485}\)

\(^{479}\) (1601) 5 Co Rep 117a.


\(^{481}\) [2007] EWCA Civ 1329.

\(^{482}\) [1991] 1 QB 1.

\(^{483}\) *Collier v P & M J Wright (Holdings) Ltd* [2007] EWCA Civ 1329.

\(^{484}\) (1601) 5 Co Rep 117a.

\(^{485}\) *Collier v P & M J Wright (Holdings) Ltd* [2007] EWCA Civ 1329.
The effect of *Pinnel’s Case* in the context of the partial fulfillment of contractual obligations are described in *Coudery v Bartrum*, where Sir George Jessel MR observed:

“According to English common law a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or tomtit if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English common law he could not take 19 shillings and sixpence in the pound; that was *nudum pactum*.”

The facts of this case show that if a debtor offers to pay part only of the amount he owes, the creditor voluntarily accepts that offer, and in reliance on the creditor’s acceptance the debtor pays that part of the amount he owes in full, the creditor will, by virtue of the doctrine of promissory estoppel, be bound to accept that sum in full and final satisfaction of the whole debt. For him to renege on the revised agreement, will of itself, be inequitable. In addition, in these circumstances, the promissory estoppel has the effect of extinguishing the creditor’s right to the balance of the debt.

Furthermore, *Coudery v Bartrum* demonstrates how *Pinnel’s Case* allows part-payment where something (of lesser economic value than what is owed) other than money can be used to bridge the deficit. Just as the law does not concern itself as to the economic value of items, other than to satisfy itself that such items have some economic value, it cannot deny nor ignore the indisputable fact that one amount of money is economically not the equivalent of another amount of money. There can be a bargain (the motivation of which is not the
court’s concern) in purchasing a house in return for a peppercorn, but there can be no bargain in paying €100 in return for €50 (unless there is an intrinsic value in the note itself - such as a printing error making it a collector’s item, for example). The court will only enforce contracts which are bargains.

4.6. Consideration in the context of contractual modifications

The concept that there is a single, unified, constant doctrine of consideration is one which must be examined and indeed challenged in the light of the foregoing. Furthermore, it is necessary to challenge not just the fundamentals of the doctrine, but to also pose some questions reaching into the core of consideration and particular its relevance to modern contract law, and in particular its relevance to modern construction contracts with respect to variations.

An obvious aspect of construction projects, and indeed most commercial contracts, is that they are, by their nature, commercial arrangements: commercial itself being defined as, “Making or intended to make a profit.” While this in itself is obvious and certainly unsurprising, what does indeed appear somewhat counterintuitive is that a commercial contract could possibly be entered into (assuming the absence of duress or other mitigating factors) without both parties doing so for their respective better interests. In other words, they enter into a contract to get something of commercial value in return. Of course, what is viewed as commercially valuable is then a question for discussion. Take the example of a construction company which contracts with a property developer for the construction of a speculative office building. In this example, the contract is enforceable if the consideration requirement is met through the principle of something of value moving from the promisor; which certainly would be the case under normal contracting conditions: the contractor might receive monetary

491 Oxford Dictionary, (Online edition), <http://oxforddictionaries.com/view/entry/m_en_gb0165840#m_en_gb0165840>, accessed 15 September 2010,
payment for providing the developer with an office block and he may benefit from being awarded future contracts. When the project is midway through construction, and the developer wishes to modify the office layout to accommodate a tenant he has secured, the construction company may agree to the modification, and not charge for the work (for whatever reasons it may have to do that). Later in the project, the developer and the contractor fall out of favour with each other, and the developer insists that the contractor complete the agreed variation to the layout. The contractor refuses because of lack of consideration, yet the developer has signed a tenant on the basis of the modification to the layout. Then there exists a difficult situation where the enforceability of the modification is not at all clear. Issues such as reliance on the modification come into effect, with the possibility of the contractor being estopped from insisting on performance of the original contract. There is also the question of what consideration might have be present in the non-classical sense of practical rather than economic value.

The words of Lord Goff in *White v Jones* are strongly critical of the doctrine of consideration:

“Our law of contract is widely seen as deficient in the sense that it is perceived to be hampered by the presence of an unnecessary doctrine of consideration.”

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494 This situation is not exclusive to the client/main contractor relationship in construction, and can also arise between the main contractor and its subcontractor(s). See SJW Facades Ltd v Bowen Construction Ltd & Anor [2009] IEHC 49, and Winthorp Engineering & Contracting Ltd v Cleary & Doyle Contracting Ltd [2011] IEHC 249.

495 *White v Jones* [1995] 2 AC 207.
However, it is important to pause for reflection in this regard. The doctrine of consideration has been evident since its first mention in *Manwood v Burston* in 1587, and has existed, with some modifications, since that time. Many have come and gone who have criticised the doctrine and have decried its demise. In this context, it is interesting to pause and contemplate the words of Markensisn who states, in his introductory paragraph, that students of the law of contract, and in particular of cause and consideration, could not have failed to notice “the extraordinary tenacity which has enabled these concepts to survive the attacks of eloquent critics who have doubted their existence.” This is thus an important reminder to investigations such as this, that the doctrine of consideration, while it has apparent and obvious anomalies, may not be as easily written off as one may have thought upon an initial examination.

The question which remains, then, is perhaps best reduced to:

*What role does consideration play in the enforcement of construction contract modifications, which were clearly intended to be enforceable in the first instance?*

This is a complex question, which this thesis aims to answer. A useful starting point, in this regard, are Chen-Wishart’s consideration reform suggestions which can be summarised as:

1) **Replace consideration with the test of intention to be bound**

In this suggestion, Chen-Wishart comments that since *Williams v Roffey Brothers and Nicholls (Contractors) Ltd*, there has been a movement from the bargain

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496 *Manwood v Burston* (1586), 2 Leonard 203.


view of the contract towards enforceability based on the intention of the parties. However, as Atiyah notes,

“… Changes in social and commercial conditions, and changes in the moral values of the community, mean that the courts will not always find the same reasons of the enforcement of promises to be good today as their forbears did; equally, it is likely that they will often find good reasons for the enforcement of promises where their predecessors did not.”

In conclusion, in this regard, Atiyah questions “whether the ‘intent to create legal relations’ formula will in the long run work any better than the rules of consideration.”

ii) Replace consideration in modifications with the test to be bound

This proposal puts that consideration only be required in the formation of the original contract, and not in any modifications to contracts.

iii) Consideration means a good reason for enforcement

In this proposal, Chen-Wishart refers to Atiyah’s conclusion that:

“When the courts found a sufficient reason for enforcing a promise they enforced it; and when they found that for one reason or another it was undesirable to enforce a promise, they did not enforce it. It seems highly probable that when the courts first used the word ‘consideration,’ they meant no more than that there was a ‘reason’ for the enforcement of a promise. If the consideration was ‘good’, this meant that the court found sufficient reason for enforcing the promise.”


501 Ibid.
iv) Retain bargain consideration but give due recognition to non-contractual sources of liability

The premise of this suggestion lies in the reasoning that retaining bargain consideration for the enforcement of some promises, should not preclude that non-bargain promises may also have enforceability.

There are, of course, good reasons for the doctrine of consideration existing and remaining, and it performs some invaluable functions in the analyses of contracts. The doctrine of consideration has a formal aspect in the construction of contracts, in that it can provide an evidentiary function, a cautionary function, and a channeling function. The evidentiary function enables the provision of evidence of the existence of the contract in the case of dispute; the cautionary function “may act as a check against inconsiderate action”; and the channeling function “offers a legal framework into which the party may fit his actions, or … it offers channels for the legally effective expression of intention.” It can therefore be accepted that the quantity or value of the consideration is of less relevance than its mere existence, and it then becomes an existential matter as to whether it can be concluded that the presence of consideration is accepted in a given case. This is why Williams v Roffey Brothers and Nicholls (Contractors) Ltd is of such interest in this area of the law, in that the manner in which the existence of consideration was accepted by the courts was viewed as being novel.

502 LL Fuller, ‘Consideration and Form’ (1941) 41 ColumLRev 799.


504 Ibid.

4.6.1. The Canadian View on Consideration in Contractual Modifications, in NAV Canada v. Greater Fredericton Airport Authority Inc.\textsuperscript{506}

This case, which came before the New Brunswick Court of Appeal in Canada, is of particular interest to common law jurisdictions as it takes some very interesting steps in evolving the law on consideration, while also offering insights into the area of economic duress (which will be discussed in the next chapter).

4.6.1.1. Outline of the Case

The case, which was briefly alluded to earlier, relates to a dispute over payment between the plaintiff, Nav Canada, and its client, the Greater Fredericton Airport Authority Inc. The parties were in an Aviation and Services Facilities Agreement (ASF Agreement) with each other, in which Nav Canada was contracted to provide aviation services and equipment provider to the Airport Authority. The Airport Authority decided to extend one of its runways, and it requested that Nav Canada relocate the instrument landing system to the runway which was not being extended. Nav Canada recommended that it made better economical sense to replace part of the system (referred to as a “NDB”) with another (referred to as a “DME”), but disagreement developed as to which party should bear the acquisition cost of $223,000. From the beginning, the Airport Authority insisted that it was not contractually required to pay, but eventually agreed in a letter written “under protest” in order to ensure that the work was expedited. As a result of that letter, Nav Canada ordered the equipment, but the Airport Authority subsequently refused to pay.

At arbitration, it was determined that the subsequent exchange of correspondence between the parties, (including the letter written “under protest,” which the

\textsuperscript{506} [2008] 290 DLR (4th) 405.
arbitrator rejected was sufficient to negate contractual liability), amounted to a separate and binding contract which was supported by consideration, and that Nav Canada was entitled to recover the cost of the DME equipment from the Airport Authority. The arbitration ruling was subsequently overturned by the Court of Queen’s Bench; this decision being further upheld on appeal by Nav Canada to the Court of Appeal.

4.6.1.2. Robertson JA on behalf of the New Brunswick Court of Appeal on Consideration

To begin with the discussion on this judgment, it is worth prefacing with the comment that the Court of Appeal did not uphold the decision by the Court of Queen’s Bench for the reasons that that lower court relied upon. Instead, the Court of Appeal took a very different approach along the lines of economic duress and consideration, and offers much by way of insight into this area of contract law in its judgment.

Early in his judgment, Robertson JA highlights that he is willing to take a progressive view of consideration, and that his view in this regard may tend towards the Williams & Roffey v Nichols (Contractors) Ltd end of the scale, particularly where contract variations are concerned:

“As a matter of law, however, I am prepared to recognise and adopt an ‘incremental’ change in the traditional rules by holding that a variation unsupported by consideration remains enforceable provided it was not procured under economic duress.”

He is similarly blunt in terms of his views on extant law regarding the determination of the existence of economic duress:


509 Ibid.
“There is jurisprudence that holds that the exercise of ‘illegitimate pressure’ is a condition precedent to a finding of economic duress. I respectfully decline the invitation to recognise such pressure as an essential component of the duress doctrine, at least in cases involving the enforceability of variations to an existing contract. It is not the legitimacy of the pressure that is important but rather its impact on the victim…”

Taking the issue of the existence of consideration firstly, Robertson, JA outlines the classical approach to the enforcement of variations to an existing contract, and then delivers a scathing swipe at previous courts’ attitudes towards consideration: 510

“Indeed, courts have adopted an number of ‘legal fictions’ to avoid the blind application of the classical rules, thereby turning a gratuitous promise into an enforceable one.”

And later: 511

“We should not be seduced into adhering to a hunt and peck theory in an effort to find consideration where none exists, nor should we manipulate the consideration doctrine in such a way that it is no longer recognisable.”

What is referred to in these instances perhaps includes devices such as “practical benefit” as construed by Lord Glidewell in Williams & Roffey Brothers v Nicholls (Contractors) Ltd; 512 a case which is given special attention by Robertson JA, when he says that the instant case “should build upon the English Court of Appeal’s decision” in Williams v Roffey Brothers and Nicholls (Contractors) Ltd. 513 Further, and more pointedly, he notes that he is:


511 Ibid. at 29.


513 Ibid.
“[P]repared to accept that there are valid policy reasons for refining the consideration doctrine to the extent that the law will recognise that a variation to an existing contract, unsupported by consideration, is enforceable if not procured under economic duress.”

It is this qualification, (that it is not procured under economic duress), which enables Robertson JA to deviate from more classical approaches to the consideration requirement. This is viewed by Robertson JA in the context of what he sees as the commercial reality whereby contracts are frequently varied in order to deal with situations and occurrences not envisaged at the outset of the contract. It therefore becomes necessary to adapt the particulars of contracts, in a somewhat agile manner, and the law must then protect the parties’ “legitimate expectations that the modifications or variations will be adhered to and regarded as enforceable.” This new approach should apply to post-contractual modifications.514 Robertson JA is not advocating the elimination of the doctrine of consideration; but instead that it is clarified to a point where it, in his view, “relieves the courts of the embarrassing task of offering unconvincing reasons why a contractual variation should be enforced.” In this sense, such a change is perhaps to be welcomed, especially if it creates more clarity, and in turn retains the certainty that its existence offers:

“Parties to a contract and to litigation are entitled to expect that there is some certainty in the law and that it is not dependent on the length of the chancellor’s foot.”515

In this context, Robertson JA expands with the following view:516

“For courts to find consideration by holding, for example, that the parties implicitly agreed to a new term is to weaken the law of contract, not strengthen it.”


515 Ibid. at 29.

516 Ibid.
By tidying or “modernising” the doctrine, as is doubtlessly the intention in this judgment, Robertson, JA believes that greater certainty will follow from removing the vagaries and replacing them with the strict certainty that for contract modifications, the absence of consideration need not necessarily invalidate a contract, once the absence of economic duress is confirmed.

However, such an approach warrants careful thought. The full effect of the “incremental” change proposed to the consideration requirement must be assessed. On the face of it, what is proposed is that essentially there is no requirement for consideration to modify contracts, once the parties are in a freely-entered-into contract, and the there is no presence of economic duress\textsuperscript{517} forcing the modification. This would seems to be much more than what is suggested as being a mere “incremental” change to the rules of contract. This change could have implications for such requirements as past consideration: if consideration is not required for each change to a contract, then the rule on past consideration must also be abolished. If economic duress is the only vitiating factor the court fears, then does it ignore other types of vitiation of consent, such as psychological, reputational or character based? Or does it attempt to classify all of these (and the others which may be there) as “economic duress”? This is a vital aspect of any proposal to remove the consideration requirement for the modification of existing construction contracts, which would result in placing more emphasis on the role of duress as a vitiating measure. Accordingly, this will be more fully examined towards the end of the next chapter when a framework for determining the presence of duress is presented.

\footnote{Economic duress will be discussed in the next chapter, but for now, it can viewed as a form of duress which has a financial, as opposed to physical or proprietary, implication on the affected party.}
4.7. The use of the concept of “practical benefit,” and the alternative approaches

The traditional view is that the non-acceptance of the concept of practical benefit ensures that for the consideration to be good, it can only be something of intrinsic economic value and once again be something of value in the eye of the law. Unless the element which transfers from the promisee is something of economic value (though not necessarily of sufficient value), it cannot therefore be reckoned to be good consideration. However, with the acceptance of the courts of the notion of practical benefit, this has since changed the understanding of how consideration may be deemed to exist.

Practical benefit, in its simplest form, is a justification for acknowledging the presence of good consideration in situations where consideration of economic value may be lacking, but instead a practical benefit exists. This may manifest itself in the guise of a non-economic benefit such as the other party actually discharging their duty under the contract, thus saving the other party the inconvenience of having to procure an alternative contractor to perform that which was to be completed at the outset of the contract. Whether or not something of economic value is exchanged between the parties is immaterial if one accepts the validity of practical benefit as constituting consideration, and the important aspect is in the determination of the practical benefit as such, as opposed to the economic benefit (however trivial) conferred by the traditional view of the doctrine.

This has resulted in some dissenting views on the rationale behind such determination, and indeed has led some commentators to infer that the doctrine of consideration is merely a device by which the courts enforce those contracts they deem to be enforceable, and vice versa. If one accepts this view, then it is indeed possible to postulate that the doctrine is merely a mechanism used entirely at the discretion of the courts in order to arrive at a preferred outcome. This raises the
question as to the relevance of the doctrine in today’s legal environment where it occurs that contracts are enforced or not, based on the existence of or for want of consideration. The key area of examination of this thesis is to assess whether this is appropriate in the specific circumstance of construction contract modifications, and whether modifications to such agreements should (and indeed, could) be enforceable without fresh consideration, taking due account of the possibility of reliance on the original agreement and ensuring that there is no evidence of duress.

Such approaches have been considered to some degree previously. Hooley\(^{518}\) is critical of the approach by the English courts in not dealing with any inconsistencies and reviewing the situation once and for all, and he notes that efforts were made in the American courts to use good faith to distinguish between encouraging performance and extortionate behaviour:

“The doctrine of consideration has been used as one of the piecemeal solutions adopted by the English courts. However, reliance upon that doctrine has made flexibility the victim of certainty. With certainty the parties to a contract know where they stand. They can expressly allocate risk and insure accordingly. But in many contracts this simply does not happen. Moreover, protracted negotiation and extensive contractual documentation can prove costly and time consuming. It can sour a commercial relationship at an early stage. Such consumers of legal services require a flexible product to meet their needs: a product which will allow renegotiation in the light of changed circumstances but also one that will protect them from extortion …

American courts have been prepared to grasp the nettle and draw a line between inducement and extortion according to a doctrine of good faith. If a demand for increased remuneration stems from extrinsic and unanticipated circumstances it may be held to be evidence of good faith. But this will not always be the case as the demand may exceed that which is necessary to deal with the circumstances that have arisen. However, even an unjustified demand creates a new circumstance for its recipient to consider. In the light of such a change the

performance of, or promise to perform, and existing contractual duty may generate its own consideration.”

Previous to this, Olsen had raised similar suggestions emphasising the necessity to establish good faith:

“The best solution may be the most basic. With the adoption of the Uniform Commercial Code in California, the law will provide that an agreement modifying a sales contract needs no consideration to be binding. Section 2-209 of the Uniform Commercial Code has been amended to include the formal requirements of California Civil Code Section 1698, and, therefore, the modification must be in writing or fully executed to serve as a valid alteration of a written contract. The comment to this section explains that the modification must be made in good faith, that there must be a legitimate commercial reason behind the modification, and that mere ‘technical consideration’ will not support a modification made under conditions of bad faith. The language of the comment referring to a ‘legitimate commercial reason’ as a basis for contract modification is not unlike the civil law concept of cause. Both purport to look to the intentions and motives of the parties rather than to the presence or absence of a technical or fictional transfer of values. Commercial reasons beyond the realm of those involving unforeseen difficulties will furnish adequate grounds for modification.”

Interestingly here, Olsen identifies that commercial efficacy should be at the fore. This is a view shared by Chandler, who highlights that economic duress may be a mechanism to limit difficulty in doing so:

“In order to flourish, the reasoning in Williams must be supported by effective, practical rules of economic duress which transcend metaphysical abstractions or indeterminate statements of public policy. Commercial certainty demands intelligible legal definition when assessing a transaction’s possible unconscionability.”

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However, in removing the consideration requirement, Olsen notes that:

“It must be admitted that removing the consideration requirement will reverse the presumption of unenforceability in cases of modification not accompanied by consideration. The modification will be presumed valid and the party who alleges he had his arm twisted will be forced to prove it. Removing the consideration requirement will also eliminate the means by which a court can defeat modification if the court suspects the change was achieved unfairly. This problem may be partially alleviated by requiring the party seeking to rely upon the modification to prove his ‘legitimate commercial reason.’ This will not, however, deter the party who encounters such a situation from seizing the opportunity to extract more money from the other party.” 522

Halyk shares similar concerns that the unscrupulous may benefit from the removal of the consideration requirement, and holds out the example of contractors tendering low in order to win projects, and subsequently seeking more money for doing the same:

“Should the decision of the English Court of Appeal in Roffey be followed in subsequent cases, it is conceivable that contractors such as Williams would tender low in order to secure a particular contract. Once the impecuniosity of the contractor leaves his employer faced with the prospect of having to pay a penalty for lateness as well as to suffer other damages, the contractor may then expect to be offered a bonus to complete his obligations under the contract. Apart from making nonsense of the entire tendering process, such activity would result in a suboptimal allocation of resources within society. The most efficient contractor, that being the contractor who could in fact complete the project at the lowest cost, may well be denied the opportunity to do so. Also, the consequential legal and administrative costs that would arise when the parties went about dealing with the possibility of nonperformance would serve to increase the overall cost of completing the project.” 523


Halyk sees promissory estoppel as a mechanism for avoiding such eventualities, and places the responsibility on the courts to explain their true motivations (making the significant assumption that they are not currently being fully forthcoming) for enforcing, or not enforcing a contract:

“If the courts were to approach future cases similar to Roffey through the doctrine of promissory estoppel, judges would be free to articulate the real reasons underlying their decisions whether to enforce a promise made to alter existing legal relations, rather than grasping onto unpredictable and unprincipled notions of “practical benefits” accruing to the promisor. The judgments of the courts would send a clear signal that unconscionable conduct in commercial relations is not to be tolerated.”

Chandler proceeds to conclude that:

“The shift towards combining intention with notions of economic duress as the yardstick for enforceability of contracts is welcome provided that the latter doctrine becomes efficacious. If this is not possible, the unpredictable boundaries of legitimate commercial pressure are as criticizable as the earlier principles of sufficiency of consideration. Nevertheless, the new framework must be more desirable in that a rational evaluation can be made of the duress that consideration has cloaked, while the essence of bargain is preserved in the concept of practical benefit/detriment. Most significantly, the implementation of the bargain should no longer be dependent upon either consideration’s inherent rigidity or its invented artifice.”

Broadly in agreement with this line, Adams and Brownsword give the finding of “practical benefit” a cautious welcome. On one hand it creates the opportunity to remove some legal difficulty, provided, as they note, that this opportunity is not passed over resulting in the finding of some new legal difficulty:

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“Overall … the decision in Williams v Roffey is to be welcomed. Admittedly, it may substitute one set of problems for another; but the portents are reasonably encouraging. Provided that the judges do not get side-tracked down a conceptual cul-de-sac in search of ‘practical benefit’ - thereby transforming the old search for ‘extra detriment’ into a new search for ‘extra benefit’ - there is a real opportunity for contract to be released from the iron cage of benefit and detriment (together with the restrictive idea that the law of contract is predicted upon non-relational transaction). So released from the shackles of the nineteenth century, the courts will be free to address the important principle presented by market transaction in the late twentieth century.”  

4.8. Conclusions

There is much to suggest that consideration is an outdated doctrine; one whose role in the law of contract is no longer relevant. However, it is noted here that simply because a rule has shortcomings does not necessarily mean it has no value. Construction contractual modifications are often borne out of necessity to complete the project in the face of changing circumstances. The “practical benefit” concept in Williams & Roffey Brothers v Nicholls (Contractors) Ltd is but an attempt to reflect that commercial reality. Both parties wish to contract, they intend that the work be completed as quickly as possible, and they are each receiving a benefit from that. To invalidate such a contract for want of consideration would seem to run contrary to the commercial reality of the situation. The converse would also apply, and it can be argued that without the doctrine of consideration, greater abuses would occur in such scenarios:

“If one party (A) threatens to break his contract in order to compel the other party (B) to confer some further benefit on A, such as price increase, and A knows of B’s


Atiyah does not believe that the solution to a situation whereby contract modifications do not require fresh consideration to be enforceable lies in promissory estoppel. Nor is the deployment of the doctrine of economic duress as the solution to this difficulty without criticism, which will be discussed in the subsequent chapter. Challenges exist in this option in creating a clear definition of the vitiating duress in order to provide the dual necessary functions: providing the certainty which contracting parties need, while simultaneously preventing the exploitation of the vulnerable.

Ultimately, this thesis is questioning whether or not the traditional or classical rules of contract enforcement for variations are practical in terms of modern construction contracts. This discussion on consideration does indeed raise some questions about its role in such situations. There is perhaps merit in the approach adopted by the Canadian courts in *NAV Canada* in at least questioning the relevance of providing consideration where modification are agreed between parties already in a freely-entered-into commercial contract, but there are still important areas to address here. Again, this comes back to the comments made in the opening chapter of this thesis, which notes that the same body of contract law applies equally to the littlest and the greatest of contracts. The fundamental question begs, is this appropriate in a construction contract modification context?

Reiter, in a criticism of the pre-existing duty rule, neatly sums up the role of all rules in such situations:

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“Legal rules should only be retained so long as they promote desirable social policies, only so long as they are consistent with sense and reason, and only so long as they help courts make decisions.”

If the current understanding of consideration is that it is simply a reason for the enforcement of a promise the courts find to be one which should be enforced, then perhaps it is worth looking at a mechanism to do the opposite: a mechanism to find a reason to vitiate those agreements which should not be enforced. The next chapter on duress (and particularly on the area of economic duress) explores this concept more fully.

Additionally, Stilk v Myrick raises the suggestion that there is merit in taking certain types of transactions and treating them differently. A contract involving sailors is possibly one which, particularly at the time, may necessitate some form of separate treatment because of its importance. In support of this, the nature of such transactions requires a degree of certainty beforehand, and it could be argued to be part of a disciplinary concept at sea, where people’s lives are intrinsically linked to their and their colleagues’ behaviour. The notion of taking construction contracts, and the law treating them differently, is a point which will become central to the later findings and proposals of this thesis.

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532 (1809) 6 Esp 129.
5. Enforcement Issues in Construction Contract Variance II - Voluntariness versus Duress, including Economic Duress

5.1. Introduction

The previous chapter on consideration raised important issues relating to the relevance of consideration for contractual modifications. A key theme emanating from that chapter is that if consideration is not required for contractual modifications, there are problems using a reliance-based model such as promissory estoppel of enforcement, and that perhaps an alternative lies in a duress-based model of vitiation.

This chapter examines the doctrine of duress, with a particular focus on economic duress. As mentioned, it is necessary to look at this area, in terms of the direction of this thesis, in order to understand some of the mechanisms available to vitiate construction contract modifications, should duress be a factor. Where contracts variations have been made, the possibility exists that it may have been obtained by duress; and in a construction contract sense, this may be in the form of what is referred to as “economic duress.” If contract modifications are to be enforceable without consideration (which is the reason for the enforcement), then a much greater emphasis is placed on the determination of duress (which becomes the reason for the vitiation of a contract assumed by default to be enforceable). It should be noted that duress is not a cause which the courts accept readily, particularly where the agreement is the result of a bad bargain, and there is good
authority in this regard. Additionally, the Supreme Court of Ireland has highlighted the distinction between situations involving duress on one hand, and fraud, mistake or misrepresentation on the other.

5.2. The Importance of Duress to this Research

A crucial part of this thesis is to identify how unscrupulous behaviour is to be prevented, should this thesis ultimately conclude that consideration should not be required under certain circumstances of construction contract variation. If the consideration requirement is removed, then it follows that all contracts or modifications are automatically enforceable, provided the other necessary ingredients for validity are in place, and that there is no presence of duress. Such a change would therefore place a considerable burden on the doctrine of duress; particularly since it is a doctrine which the courts have heretofore unwilling to rely upon. Nonetheless, if that is what this thesis is likely to conclude, then it is necessary here to examine the issues relating to duress such that it can become the effective bulwark against opportunistic and unscrupulous behaviour that it needs to be. This is a particularly problematic aspect for the Irish construction industry, since, as referred to in previous chapters, the Irish construction industry is characterised by a preponderance of one-off housing, it is likely to be the clients of such projects that are most vulnerable to exploitation, as a consequence

533 An example is ACC Bank v Dillon & Ors [2012] IEHC 474, where, according to Charleton, J, “The doctrine of duress is not part of the law in order to interfere in the context of an imbalance in bargaining powers where that want in balance is merely the result of a difference in commercial bargaining power in negotiations conducted at arms length.” See also B. (formerly known as M) v L, [2009] IEHC 623, and Bula Ltd (Revievership) v Tara Mines Ltd. [1997] IEHC 202, where duress was cited but not upheld. See also Cotton Box Design Group Ltd v Earls Court Company Ltd [2009] IEHC 312, Griffin v Madden [2001] IEHC 92, Mercury Engineering & Ors v Mc Cool Controls and Engineering Ltd & Ors [2011] IEHC 425, O'Malley Construction Company Ltd v Galway County Council [2011] IEHC 440, and Lambert & Anor v Lyons & Ors [2010] IEHC 29, where duress was claimed but not upheld. Cf. C. v S. [2008] IEHC 463 where a marriage was rendered null and void by reason of duress, and O'Sullivan v Weisz [2005] IEHC 74 where a contract was vitiates by the presence of duress.

534 F (P) v O'M (G) [2000] IESC 81, [2001] 3 IR 1, “Historically both in Irish and English law a clear distinction has been drawn between duress, which vitiated consent and was a ground for nullity, and fraud, misrepresentation or mistake, none of which was a ground for nullity.”
of verbally-made modifications to perhaps unwritten construction contracts. By extension then, the burden of proof of the presence of duress remains with the alleged victim (in the case of one-off houses, this is often the unsophisticated - from a construction perspective - homeowner). Adding such a burden to this classification of construction employers may be unwise.

Of course, it remains the case that duress is a vitiating factor for all contracts, as the law currently stands. So, a contract modification properly formed and with consideration, is still vitiable if duress is shown to be present. The difference being, that if it is proposed to partially abolish consideration under certain circumstances, duress becomes the only mechanism open to avoid one party taking unjust advantage of another. Where consideration is required and not present (as is currently the case), the courts can more easily hold that there is no valid contract or modification for want of consideration; but where this is not required, a much greater onus is therefore placed upon the proving of the existence of the subjective concept of duress. This must be reconsidered here to develop a clearer understanding of the doctrine for the specific circumstances in question, which is readily-determinable and available to affected parties. If it remains in its current obscurity, only coming out when absolutely needed, and generally such problems are handled by other aspects of the law, then it becomes very difficult to progress this as a likely conclusion of this study. Therefore, this chapter must set out what exactly duress should mean for the Irish construction industry, and establish a mechanism for determining where the boundary between duress and normal bargaining in this industry should lie. Until and unless this is properly established, any proposal to partially abolish consideration by placing greater reliance on duress, falls short.
It is said that construction cases such as *Williams & Roffey Brothers v Nicholls (Contractors) Ltd*, *DSND Subsea v Petroleum Geoservices*, and *Carrillion Construction Ltd v Felix (UK) Limited*, have all played a key role in the development of the doctrine of economic duress. What is important to assess here are the different views on the criteria for duress, and to examine how these may apply to instances of duress in situations involving modifications of construction contracts. It is not necessary in this thesis to present a full outline of the theory of duress: it is assumed that the reader has sufficient knowledge in this regard, so only a very brief description of duress is provided in order to advance the discussion.

Duress occurs where one party to a contract has coerced the other or exercised such domination that the other’s independence of decisions was substantially undermined. It is the case that “a contract is voidable at common law if it was made under duress.” The concept of duress, however, is a multi-faceted relief mechanism from the enforceability of a contract. That which was originally viewed as duress, and hence worthy of the courts’ relief from contract obligations: duress to the person, has extended beyond the pure act or threat of physical violence or action for failure to enter into a contract, and now covers such areas as duress of goods, and, more recently economic duress. Duress itself was established as early as the thirteenth century, where the focus of analysis was

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on two factors: the act of coercion itself and its effect on the victim in inducing fear.542

The generally accepted test for duress should be that duress exists, in whatever form it takes, if it involves coercion of the will so as to vitiate consent. The threat must be to do something illegitimate (which, on this side of the Atlantic, includes a threat to breach an existing contract), plus the pressure actually caused the threatened party to enter into the contract.543

A test for duress can conclude that duress exists if the following criteria are satisfied:

1. There is coercion which threatens something illegitimate (including something unlawful, including a threat to breach an existing contract) if consent is not given.
2. This coercion of the will having the effect of vitiating consent.
3. The coercion actually caused the threatened party to consent and enter into the contract.

A primary challenge with an assessment of duress is how the presence of duress is ultimately determined, on the basis of the above criteria, and bearing in mind that bargains freely entered into should be enforced.544 There are two key approaches to this, and each needs to be considered and appraised in the context of their appropriateness for determining duress in construction contract modifications. The first is that there is an analysis to determine the presence of illegitimate pressure (which will be looked at in more detail to understand what exactly is meant by illegitimate pressure), and the illegitimate pressure alters the


negotiation to the detriment of the pressurised party. The second is an analysis to
determine, from the victim’s perspective, if the will has been overborne, because
if the will is overborne, there is no true freedom of contract, and hence the
contract may be set aside.

Economic duress involves the use of a superior explicit or implicit financial
bargaining position in order to extract a benefit, and is a much more nebulous
concept than the more obvious forms of duress to the person and to goods.545 To
differentiate economic duress from other forms of duress, economic duress does
not involve threatening the physical welfare of the person, or goods belonging to
or necessary to the person’s health and wellbeing, but instead uses the superior
position of one party to take advantage of another.546 A key source of the
difficulty lies in the reality that there is generally an inequality in the economic
bargaining power of parties in renegotiating terms of a construction contract, and
the challenge is to determine when what may be classified as robust negotiation
crosses the line and becomes economic duress. The consequent problem, and,
one presumes, a logical and subsequent difficulty for the courts, is to determine
the difference between commercial agreements entered into freely, whereby one
party has more bargaining power than other, or exerts “commercial pressure”547
(as is often, though not always detrimentally, the case), and instances where one
party abuses his superior position to force the other party to agree to a contract.548
The primary challenge, consequently, for this analysis of duress is to establish
where the boundary between robust commercial negotiation and illegitimate

545 See Andrew Phang, ‘Whither economic duress? Reflections on two recent cases,’ (1990) 53

546 See Framus Ltd. v Amantiss Enterprises Ltd. [2002] IEHC 23, where economic duress was
pleaded as a factor in driving a company out of business.


548 See also, PS Atiyah, ‘Contract and fair exchange,’ (1985) 35 Univ Toronto LJ 1-25 at 6: “We
want people to behave like reasonable people; our laws and institutions are based on the
assumption that man is a rational being,” and also Adams, ‘Consideration for requirements
contracts,’ (1978) 94 LQR 73.
pressure lies, in the context of construction contract renegotiations, and to assess the appropriateness of the reliance on duress as a measure to provide relief from modifications to contracts where abuse of power might be present.

This chapter is structured so as to examine duress from the thematic perspectives of duress in construction contract renegotiation context. This approach is necessary, since it is possible that a main recommendation of this study could place greater reliance on the determination of duress to vitiate contract modifications rather than requiring consideration to enforce same. This chapter will examine the perspective that duress is constituted by the presence of illegitimate pressure, which causes the will to become overborne, which in turn induces the contract modification. In order to demonstrate this, a detailed analysis of what exactly constitutes illegitimate pressure must be carried out. This will examine illegitimate pressure from the perspectives of the nature of the pressure, and the nature of the demand. This covers a broad spectrum of pressure types, and what constitutes illegitimate pressure in the construction industry may not be the same level of pressure in another industry. The chapter then considers the alternative perspective of the overborne will. Where the will becomes overborne should be evidenced by a lack of alternatives, but this proves problematic since very few negotiations involve both parties holding perfectly equal bargaining power. It is then necessary to show that both the illegitimate pressure, (as determined by the norms of the industry), caused the will to be overborne (in a context where it is accepted that one party is generally in a weaker position anyway) and that that caused the contract renegotiation to be agreed.

The rule for duress is succinctly stated by Dyson, J in *DSND Subsea Ltd v. Petroleum Geo-Services ASA*:549

“The ingredients of actionable duress are that there must be pressure, (a) whose practical effect is that there is compulsion on, or a lack of practical choice, for the victim, (b) which is illegitimate, and (c) which is a significant cause inducing the claimant to enter into the contract… In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. These are all relevant factors.”

This chapter will move the thesis to a position to conclude that for duress to be present in construction contract renegotiations, there must be a qualified negative effect on the victim’s free will (beyond the reduction which might be expected in robust negotiations in the construction industry, and bearing in mind that there is never true equality or true free will), which is caused by the application of illegitimate pressure (which is an inappropriate level of pressure beyond that which would be expected within the industry; unconscionable pressure or undue influence which is being applied in bad faith as determined by the norms of the industry) which causes the induction of the contract. In particular, this will require a conclusion as to where that boundary between the pressure which might reasonably be expected in the construction industry, and illegitimate pressure, may lie. The foregoing therefore will form the thematic structure of this chapter to analyse the myriad issues contained therein.

5.3. The Illegitimate Pressure Perspective

In order to prove duress, the House of Lords held that the claimant must prove the following, in the leading case, *Universe Tankships Inc Of Monrovia v International Transport Workers Federation and Others*: “illegitimate


pressure, causation, and that there was no practical alternative but to accede to the proposed terms of contract or contract variation.”

The very existence of pressure in and of itself is not usually sufficient; the pressure must be illegitimate.\textsuperscript{552} Illegitimate pressure covers a broad spectrum ranging from the illegitimacy of the pressure to the illegitimacy of the demand. The demonstration of illegitimate pressure has often been at the heart of the determination of the presence of duress. Illegitimate pressure could occur where the victim is threatened in such a way as to be construed as a breach of a common law or statutory duty. This act may be a crime, a tort, or subject to certain (and indeed, strict) criteria breach of contract.\textsuperscript{553} It may relate to situations where the victim had no practical alternative but to submit to the threat.\textsuperscript{554} The different aspects of illegitimate pressure must therefore be fully decomposed and analysed for the purposes of progressing the main thrust of this chapter.

However, the illegitimate pressure perspective is not entirely satisfactory, as will be seen. Since it is a vague concept in some cases (particularly where the pressure is not unlawful, so not automatically illegitimate), an alternative approach of looking at the impact the pressure has on the individual in terms of

\begin{footnotesize}\	extsuperscript{552} Campion Property Consultants Ltd v Kilty [2009] IEHC 147. Per McMahon, J., “The … pressures he [the defendant] was under were not such as to amount to duress of any significance and did not vitiate in any way the consent required and freely given. There is no doubt either that he knew what he was doing when he signed a contract after the auction and the completion documents some two and a half months later.”


\textsuperscript{554} Though the fact that the claimant had no practicable alternative but to submit to the demand is particularly prevalent in economic duress cases. See M Chen-Wishart, Contract Law, (Second edition, Oxford University Press 2008), at pp. 322-323, 329.\end{footnotesize}
overcoming their free will may address some of these difficulties. If the will is overcome (by pressure applied - whether legitimate or not) then the victim is not freely entering into the contract, and can there be a contract if both parties are not freely agreeing? This raises further questions as to whether there is ever true freedom of contract - is one party not always in a stronger position than the other? If that is indeed the case, then the will of the weaker party must always be overborne to some degree. The leads to the more reasonable conclusion that the will can only be overborne, if the pressure applied causes that to be the case, in a situation where the baseline is the normal fortitude to be expected of a person in exercising their free will, and founded upon the norms of the industry in question: in this case, the construction industry.

5.3.1. Determining Illegitimate Pressure - The Nature of the Demand

As mentioned in the previous paragraphs, when pressure is applied in the context of duress, this pressure must, under the normal methods of determination, be deemed to be illegitimate pressure. A difficulty identified is therefore in the determination of what exactly constitutes illegitimate pressure. Examples such as the threat of violence are given, and these are, without question unlawful acts, which may give rise to liability for criminal or tortious claims in their own right. Therefore, such acts are not only illegitimate in the context of pressure applied to the contract negotiations; they are also illegal.

555 See Anthony Kronman, ‘Contract Law and Distributive Justice,’ (1980) Faculty Scholarship Series, Paper 1069, http://digitalcommons.law.yale.edu/fss_papers/1069 for commentary on voluntary agreements: “It is possible to characterise my agreement as voluntary in one sense: after considering the alternatives, I have concluded that my self-interest is best served by signing and have deliberately implemented a perfectly rational decision by doing precisely that.”
However, where do the courts stand in relation to acts of pressure which are not unlawful? In *The Universe Sentinel*, Lord Scarman refers to the previous findings of Lords Wilberforce and Simon of Glaisdale noting that “the pressure must be one of a kind which the law does not regard as legitimate.”

Lord Scarman continued (emphasis added):

“In determining what is legitimate two matters may have to be considered. The first is as to the nature of the pressure. In many cases this will be decisive, though not in every case and so the second question may have to be considered, namely, the nature of the demand which the pressure is applied to support…. The origin of the doctrine of duress in threats to life or limb, or to property, suggests strongly that the law regards the threat of unlawful action as illegitimate, whatever the demand. Duress can, of course, exist even if the threat is one of lawful action: whether it does so depends on the nature of the demand. Blackmail is often a demand supported by a threat to do what is lawful, e.g. to report criminal conduct to the police.”

This analysis is built upon the view of Lord Atkin, who, on the matter of unlawful pressure and demand, in the context of blackmail, stated that:

“The ordinary blackmailer normally threatens to do what he has a perfect right to do - namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened. Often indeed he has not only the right but also the duty to make the disclosure, as of a felony, to the competent authorities. What he has to justify is not the threat, but the demand of money.”

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It is established in *Occidental Worldwide Investment Corp v Skibs A/S Avanti*\(^{560}\) that economic duress could be defined as situations where a contract could, in certain circumstances, be set aside where the threat of such serious financial consequences is present which gives the threatened party no practical choice but to enter into the contract.\(^{561}\) Lord Diplock echoed this view in *Universe Tankships Inc of Monrovia v International Transport Workers’ Federation*,\(^{562}\) where he concluded that:

“There must be pressure, the practical effect of which is compulsion or the absence of choice. The classic case of duress is, however the victims intentional submission arising from the realisation that there is no practical choice open to him.”

This aspect of the reduction of choice is expanded upon by Bigwood,\(^{563}\) in discussing a two-pronged theory of duress, by looking at the nature of the demand, where it is more formally affirmed that duress comprises of illegitimate pressure, together with that pressure having induced the contract. When examining whether or not the pressure applied actually induced the contract, Bigwood investigates the difference between ‘threats’ and ‘offers’ in order to determine if the will was overborne. This is an important area for clarification, since it is conceivable that many robust discussions on the terms of contracts under negotiation, or more particularly for the purposes of this study, under renegotiation, could involve elements where one party makes an offer which

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\(^{563}\) The two-pronged theory of duress requires the presence of two seemingly independent tests for duress. Each test is deemed necessary, but neither on its own is sufficient to establish the presence of duress. The first is the *choice* prong, which tests the element of the alleged victim had no reasonable or acceptable alternative but to agree to the contract, and the second prong: the *proposal* prong, which tests whether or not illegitimate pressure was applied. See Rick Bigwood, ‘Coercion in Contract: The Theoretical Construct of Duress’ (1996) 46 Univ Toronto LJ 201-271 at 209.
could be construed as a threat by the other party. The other party, perceiving the ‘threat’ then agrees to enter into the contract, and subsequently finds it impossible to prove duress in order to vitiate the contract, since what it construed as a ‘threat’ was only an ‘offer.’ Bigwood’s guidance in this area is especially useful. A threat, in terms of coercion or duress, is readily identified when it is something as obvious as “I’ll blow your head off if you don’t sign this contract!” However, this is not always so blatant and apparent. Bigwood concludes that the distinction between threats and offers lies in the fact that:

“A threatens B by proposing to make B worse off relative to some baseline; A makes an offer to B by proposing to make B better off relative to some baseline; offers augment a party’s alternatives, whereas threats reduce them.”

An important aspect of this description relates to the baseline: the moral or legal obligations of the person making what could be construed as either a threat or an offer. The same course of action can rightly be deemed either a threat or an offer, depending on the circumstances, so an understanding of the parties’ obligations is essential in making that distinction. As a result of that analysis, “only threats are coercive.” Therefore a distinction must be made as to whether the pressure applied is increasing the other party’s options or reducing them. A party may perceive that they are being illegitimately pressurised when in fact the the nature of


566 The baseline referred to could be based on the moral or legal obligations of the parties involved. For example, an engineer in private practice could charge a person a fair price of €500 to investigate problems with potential subsidence of their local authority house (an offer, since it increases their options, and the engineer is under no obligation to investigate the problem). On the other hand, a local authority engineer, who is under a legal obligation to ensure the integrity of houses under the authority’s control, who says he will only investigate the problem if the tenant pays €500, is making a threat, since his baseline includes the tenant’s right to have the problem investigated free of charge. This also has some resonance with the acceptable norms within an industry, which will be looked at in later sections of this chapter.

of the demand is not coercive, per Bigwood’s analysis. Additionally, the presence of any asymmetry of information between promisor and promisee is very difficult to remove in practice.568

Furthermore, the same course of action could be perceived differently in different industries, or with different actors. One person may find that they are threatened by pressure and that they have no choice but to accede; another may find that this is just part of what is to be expected in such a renegotiation, and will bargain accordingly. Therefore, for the purpose of this study, such a subjective analysis must be viewed in terms of the norms of the construction industry and the normal fortitude which a person in the construction industry would be expected to display.

5.3.2. Determining Illegitimate Pressure - The Nature of the Pressure

As discussed in the preceding section, if illegitimate pressure on one hand is a form of pressure which affects freedom of choice, it is necessary to examine the different forms which such pressure may take. As already stated, something which is unlawful is clearly illegitimate, but this becomes a more vague concept where the pressure in itself is not unlawful. A number of types of pressure which could constitute illegitimate pressure must be considered. These include immoral pressure, unconscionable pressure, or where undue influence is applied, and these will be examined in more detail in the next sub-section.

Lord Hoffman in R. v Attorney-General for England and Wales569 stated that “there were two elements in the wrong of duress. One was pressure amounting to


569 [2003] UKPC 22.
compulsion of the will of the victim and the second was the illegitimacy of the pressure.”

He proceeded to explain how the legitimacy of the pressure must be examined from two aspects:

“First, the nature of the pressure and secondly, the nature of the demand which the pressure is applied to support... Generally speaking, the threat of any form of unlawful action will be regarded as illegitimate. On the other hand, that fact that the threat is lawful does not necessarily make the pressure legitimate.”

Where an unlawful act is threatened, provided that it induced the consent to contract or contract modification, the contract may be set aside (that is, it is voidable, as opposed to void) by the other party.570

Lord Devlin, in *Rookes v Barnard*571 stated that there was no difference in terms of duress, between a threat of breach of contract from other forms of illegal threats, and that the nature of the threat is immaterial because its nature does not affect the victim’s actions. Using an analogy of the use of a ‘club’ he describes this as follows:

“I find therefore nothing to differentiate a threat of a breach of contract from a threat of physical violence or any other illegal threat. The nature of the threat is immaterial, because ... its nature is irrelevant to the plaintiff's cause of action. All that matters to the plaintiff is that, metaphorically speaking, a club has been used. It does not matter to the plaintiff what the club is made of - whether it is a physical club or an economic club, a tortious club or an otherwise illegal club. If an intermediate party is improperly coerced, it does not matter to the plaintiff how he is coerced.”


571 [1964] AC 1129.
As alluded to in the above references to blackmail, the position stated by Lord Devlin (immediately above) is likely to be different where what is threatened is not an unlawful act. It is the threat when coupled with demand which may constitute duress. Although such pressure is not unlawful, it is illegitimate.

The test for economic duress is satisfied in *Carillion Construction Ltd v Felix (UK) Ltd.*\(^{572}\) This judgment exemplifies the definition that duress requires pressure which is illegitimate, and that the pressure must have induced the contract. Pressure to breach a contract is an illegitimate form of pressure. This pressure resulted in fewer options open to the plaintiff, passing the test for a ‘threat’ rather than an ‘offer’ as per Bigwood, determining the coercive nature of the pressure. Again, it is of note that this is in contrast with the American perspective, referred to previously.\(^{573}\) It is also worth contrasting this with the Canadian position on pre-existing duties of contract, which is more closely aligned to the English view. *Smith v Dawson*\(^{574}\) found that performance of pre-existing duties by one of the parties is not good consideration for a new promise by the other party. Therefore a promise not to abandon the contract and pay damages is not consideration for promise to pay insurance money.

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\(^{572}\) *Carillion Construction Ltd. v Felix (UK) Ltd.* [2001] BLR 1. Carillion was employed as main contractor by Hammerson UK Properties Ltd for the construction of an office building in London. As is normal practice in such projects, the main contractor sub-contracted the design, manufacture and supply of certain specialist elements which he would not ordinarily be expected to hold expertise in himself: in this case the facade and cladding systems; which was sub-contracted to Felix (UK) Ltd. Again, as is not atypical for construction projects, the sub-contractor, Felix, began work on the design over a year before the terms of the contract between them and Carillion (the sub-contact) was concluded. During the negotiations which resulted ultimately in the contract being agreed, and prior to the completion of Felix’ work, it was suggested that the parties should endeavour to agree a draft final account for Felix’ work. This was subsequently agreed at £3.2 million, exclusive of value added tax. The contention by Carillion was that it was compelled to enter into this agreement as a consequence of a threat made on behalf of Felix that it would cease supplying the facade and cladding elements in accordance with the sub-contract between they and Carillion unless a final account sum of £3.2 million was, in fact, agreed. The case was then based on Carillion’s action to set the agreement aside for duress.


\(^{574}\) (1923) 53 OLR 615 (CA).
In terms of determining the presence of duress, the difficult question in this context relates to what actually defines illegitimate pressure. According to Tan, illegitimate pressure is simply a convenient label for the sort of pressure the law deems should not be used to secure a renegotiated contract. Hence, in *Carillion Construction Ltd v Felix (UK) Ltd*, it was the existence of the threat to withhold delivery of goods by the defendant, plus the resultant lack of choices left to the claimant which resulted in the claimant’s actions being illegitimate. Tan is correct in the sense that there can be no one correct definition of illegitimate pressure to suit all situations of contract renegotiation. Instead any analysis to determine the presence of illegitimate pressure will rely on an assessment of the situation, the pressure applied, the expectations of those involved in the negotiation, and the effect of the pressure on available alternatives.

5.3.3. The Different Forms of Illegitimate Pressure - Undue Influence and Unconscionable bargains

Further to Tan’s assertion that illegitimate pressure is simply a convenient label for the sort of pressure the law deems should not be used to secure a renegotiated contract, what can actually constitute illegitimate pressure needs to be considered further. At one extreme is unlawful pressure which is clearly illegitimate; at the other is normal pressure which could reasonably be expected to be experienced, and would not be considered to be a source of duress. Between these two lies a boundary between legitimate pressure and illegitimate pressure.

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The types of pressure often referred to as being illegitimate, (in additional to the unlawful type), include pressure which causes unconscionable behaviour, pressure applied causing undue influence, or immoral pressure.579

In order to establish the presence of undue influence, Slade, LJ, in *Bank of Credit and Commerce International SA v Aboody*580 explained as follows:

“A person relying on a plea of actual undue influence must show that (a) the other party to the transaction (or someone who induced the contract for his own benefit) had the capacity to influence the complainant; (b) the influence was exercised; (c) its exercise was undue; (d) its exercise brought about the transaction.”

Where undue influence is present, this may be evidenced by the parties agreeing to what is for one party, an unconscionable bargain: a contract which they would never have ordinarily agreed to had there not been such undue influence applied to them. The doctrine of unconscionable bargain is primarily concerned with the setting aside of a contract because of procedural irregularity in its formation. As described by Capper:

“In broad terms the unconscionable bargain requires consideration of three elements in the making of the contract. First, the party seeking relief must have entered into the contract while labouring under a significant disadvantage compared to the other. Secondly, the contract will typically (but not necessarily) confer a significant advantage on this other party. Thirdly, this party must have procured the contract through unconscionable conduct.”581


This outlines the three necessary ingredients for unconscionable bargains: relational inequality, transactional imbalance and unconscionable conduct. It can be accepted that relational inequality will almost always exist in construction contract renegotiations where one party will be in a stronger party to the other for various reasons.\textsuperscript{582} The contract variation may be of significant benefit to the party forcing the agreement, though not necessarily so. Good clarification of what constitutes unconscionable conduct is then given in \textit{Boustany v Pigott}\textsuperscript{583} where Lord Templeman, speaking for the Privy Council, agreed with the following statements presented by counsel for the plaintiff:\textsuperscript{584}

\begin{quote}
(1) “It is not sufficient to attract the jurisdiction of equity to prove that a bargain is hard, unreasonable or foolish; it must be proved to be unconscionable, in the sense that “one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience.”\textsuperscript{585}
\end{quote}

Hard bargaining must therefore be considered acceptable, and would presumably vary depending on the industry and the actors involved, but the important aspect is that unconscionability cannot rely on the bargain simply being hard. This is especially pertinent to the construction industry, where it has a long-established legacy of confrontation and adversarial behaviour, as discussed in Chapter 3.\textsuperscript{586}

\textsuperscript{582} Reasons could include suppliers or subcontractors not delivering or suppling pre-agreed products or services unless payments are revised upwards; a contractor refuses to carry out certain essential variations unless the original contract price is increased; or a contractor refusing to complete the works, (knowing that the employer will become liable for damages for delayed completion to the overall project) unless the employer agrees to make additional payments to the contractor. These and other examples from Hamish Lal, ‘Commercial exploitation in construction contracts: the role of economic duress and unjust enrichment,’ (2005) 21 ConstLJ 590. See also, in this context, Waddams, ‘Unconscionability in Contracts,’ (1976) 39 MLR 369.

\textsuperscript{583} (1995) 69 P&CR 298.

\textsuperscript{584} Ibid. at 303.

\textsuperscript{585} Referring to \textit{Multiservice Bookbinding v Marden} [1979] 2 All ER 489.

\textsuperscript{586} See Alastair Young, ‘When pressure turns to duress,’ (2012) 23 Cons Law 20-22.
(2) “‘Unconscionable’ relates not merely to the terms of the bargain but to the behaviour of the stronger party, which must be characterised by some moral culpability or impropriety.”

Here it is clearly acknowledged that there is likely to be an inequality of bargaining power in a negotiation, so it is not the agreement based on that inequality, but instead whether the stronger party acted in an appropriate manner, which again must be considered in the context of the specific industry and situation.

(3) “Unequal bargaining power or objectively unreasonable terms provide no basis for equitable interference in the absence of unconscientious or extortionate abuse of power where exceptionally, and as a matter of common fairness, ‘it was not right that the strong should be allowed to push the weak to the wall’”

(4) “A contract cannot be set aside in equity as ‘an unconscionable bargain’ against a party innocent of actual or constructive fraud. Even if the terms of the contract are ‘unfair’ in the sense that they are more favourable to one party than the other (‘contractual imbalance’), equity will not provide relief unless the beneficiary is guilty of unconscionable conduct.”

(5) “In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances.”

Following on from the previous point acknowledging inequality of bargaining power, it is held that there must be what amounts to a clear abuse of that power before relief would be offered by the courts. The stronger party should not

587 Referring to Lobb (Alec) (Garages) Limited v Total Oil (Great Britain) Limited [1985] 1 WLR 173.

588 Ibid.


necessarily be considered to be in abuse of its dominance merely because it has dominance, unless there is clear evidence of that abuse.

This is an important clarification for the purposes of this study, since it establishes that situations whereby an inequality of bargaining power exist, (which is almost invariably the case in construction), and they do not automatically give rise to relief from unconscionable bargains by virtue of that inequality. Instead it is necessary to show that the inequality give rise to an abuse of power, and it was that abuse of power which lead to the agreement from which relief is sought. The advantage which has been taken must be shown to have been “unconscientious … of his disabling circumstances.”

Essentially, unconscionability relates to that which a reasonable person would not accept, and refers particularly to where the stronger party takes advantage of the weaker party. This level of acceptability will vary, depending on the industry. It is reasonable to expect that a higher level of robustness will exist in renegotiating terms of construction contract than renegotiating payment terms with a milkman. Therefore, the level of acceptability of the stronger bargaining behaviour will be expected to be higher in the construction scenario. This describes the level of fortitude which is to be expected of a party operating in that industry. It is likely to be significantly higher for a construction professional acting in the construction industry than a householder agreeing payment terms for their milk delivery. The milkman acting with a level of pressure which would be appropriate in the construction industry may be considered to result in an unconscionable bargain for the supply of milk to a householder.

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5.3.4. The Role of Intention in Determining Illegitimate Pressure

The role which unconscionable pressure plays in the determination of illegitimate pressure is described by Koh: 593

“In determining the illegitimacy of the pressure applied, unconscionable conduct is key, whether the threat is lawful or unlawful. The main inquiry is whether on a consideration of all the circumstances, there was deliberate exploitation of the victim’s known vulnerability. In determining the issue, the court should have regard to the nature of the threat and the demand that was made, as well as the reason for the making of the demand and whether this is itself objectively justifiable.” 594

In this sense, any form of pressure, which is a deliberate mal-intended application of coercion of a victim’s weaker position, could be unconscionable, and therefore constitute illegitimate pressure. The key word in this description being “deliberate.”

Bigwood 595 affirms the notion that inequality will invariably exist, but it is how it is used which is the relevant factor in any consideration of illegitimate pressure:

“[Power’s] possession is unavoidable in our natural world of unequals, and to possess power is not necessarily to use it.” 596

We must accept, then, that there will almost always be inequality of power between parties to renegotiating elements of a construction contract, so the question arises as to when this inequality becomes the deliberate abuse of the


594 Ibid. at 581.


596 Ibid, at 506.
power held by the stronger party. For the purposes of this thesis, the reliance on duress as a vitiating factor for improperly constructed contract modifications, which are agreed in situations where such power imbalances are likely to occur, is important. As a result, it must be clear to determine when the power imbalance is deliberately abused in order to improperly coerce agreement, beyond that which would be expected to be acceptable in the industry, and hence become illegitimate pressure. In fact, and as mentioned previously, having power and using it is not, in itself, necessarily abusive:

“[Power] may allow one, if one chooses, to manipulate the contract choices and actions of one’s bargaining opponent. However, the law accepts, as it must, that manipulative capacity is to be tolerated for the most part in contractual dealings. The law could never hope to correct all the inequalities that will inevitably effect contracting parties according to their circumstances.”

This is a logical conclusion which accepts that although inequality will most likely exist, even using that inequality does not necessarily constitute illegitimate pressure, and is a view supported by Isaacs J in the Australian High Court case of Watkins v Combes, where it is noted that: “[I]nfluence may be used wisely, judiciously and helpfully.” However, the law does not accept an infinite use of that influence, and must draw the line where it becomes illegitimate:

“[T]he law becomes more vigilant when the disparities in relative bargaining power are extreme. At some point it becomes unrealistic to suppose that a person can be so much in another’s power as to keep his or her interactions free from even the gentlest influences which result from that power.”


598 (1922) 30 CLR 180.


This relates to the aspect of inequality of bargaining power which notes that people in a vulnerable position are exploitable; not that they are necessarily exploited. So it becomes unacceptable to accept a serious risk of exploitation even if that risk never eventuates. Bigwood expands upon the notion of exploitation when considering inequality of bargaining power in terms of intention. He uses a two-aspect model, referring to active and passive exploitation: both of which are exploitative, and intended to procure a contract by “motivations incompatible with voluntary action” - hence mal-intention:

“[I]n all cases in which one party seeks to be relieved of the normal moral or legal consequences of a manifested contractual assent on the ground that such assent was produced by motivations incompatible with voluntary action, the other party also has an advantage. Essentially this advantage transmits into a form of relative contracting power, which that the other party (1) consciously and affirmatively employs to secure the contractual assent of the disadvantaged party - a decidedly active process (of exploitation); or (2) knowingly, or with reason to know, desists from taking such positive steps for the benefit of the disadvantaged party as would have been necessary to correct the power imbalance existing between them - a comparatively passive process of exploitation.”

Therefore, a determination of illegitimate pressure through an analysis of intention, requires an understanding of the exploitation which did, or was likely to occur, given the inequality of the power between the parties. The role intention plays is essentially whether a party with much greater power exploited the other for his own gain in the contract renegotiation process. It is not simply that the stronger party intended to use their greater bargaining position to secure a

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603 Ibid, at 508.

604 Ibid.

better outcome for themselves: that is to be reasonably expected. Instead it is whether the relative difference in bargaining power is so great that this disparity causes, or is likely to cause, the weaker party to be exploited for the benefit of the stronger party. It is clear that where such disparity in bargaining positions exists, the stronger party should possibly consider taking positive steps to rebalance the mismatch in order to provide a defence against a future possible claim for economic duress. For example, in a construction context, where a main contractor is renegotiating terms with a small subcontractor, the latter of whom is close to bankruptcy unless agreement is reached on revised terms and payment ensues, a significant disparity in bargaining power exists. If the revised terms are agreed, since such difference in power is present between the two parties, the small subcontractor could later seek relief from the terms of the revised agreement on the basis of exploitation by the larger main contractor. In order to reduce the likelihood of this occurrence, the main contractor, could, at the time of the contract renegotiations, put in place a temporary line of credit to the subcontractor for the duration of the renegotiations. This is an unlikely course of action to be taken by a main contractor in such circumstances, though is a type of measure which may make any renegotiation more likely to be upheld against a subsequent claim for duress.

5.3.5. Community Norms and Normal Fortitude

The foregoing discussion on intention in illegitimate pressure focussed on exploitation or the likelihood of exploitation occurring due to the disparity in bargaining position of the parties to a contract renegotiation. However, exploitation in itself is a somewhat difficult concept to be clear on. Exploitation is defined as: “Taking unjust advantage of another for one’s own advantage or benefit.”\(^{607}\) Clearly, any contract formation or renegotiation is about one party taking advantage of the other for their own benefit. Exploitation, therefore, only occurs where the taking of *unjust* advantage is present. What exactly determines unjust advantage will not be the same for every situation or circumstance, and must be qualified in some way. For this, it is necessary to explore the idea of community norms: the set of behaviours expected in a community (the construction industry), based on the construction industry’s values, traditions, policies, etc; and the normal fortitude which a reasonable person operating in the construction industry would be expected to possess. Characteristics of the construction industry, which have been discussed in earlier chapters, will be useful to consider in the context of what level of pressure may be to be expected in contract renegotiations.

Firstly, to clarify what is meant by community norms: A community, or social norm, can be considered as standard of behaviour shared by members of a social group.\(^{608}\) This social group can be extended to an industry context, and it can be expected that this norm will vary, depending on this industry.

What then would be considered a community norm in the construction industry in terms of contract renegotiations? Referring to chapters 2 and 3, it can be seen that the construction industry is often characterised as a confrontational industry,


as evidenced by the widespread use of procurement structures which place the employer and his representatives in an opposite position to the contractor. This has often led to the breakdown of relationships between the parties to a construction contract, and has resulted in a preponderance of disputes in the industry.

It has been said that the construction industry is no place for the faint hearted. As Bishop et al describe the industry:

“‘Adversarial’ forms of contracting have dominated the sector, where it is commonplace for contractors at each point in the production process to exploit each other whenever possible. This has created a hostile and litigious environment that militates against more strategic and co-ordinated modes of project management.”

It is in a context such as the aforementioned that the construction industry must be considered in terms of the expectations of actors in the industry, and the degree of fortitude which must be reasonably expected of a person operating in this industry. When the courts are tasked to decide if illegitimate pressure is present in a contract renegotiation case, and if the industry in question is the construction industry, then it is reasonable to expect that a relatively high degree of normal fortitude will be a characteristic of those involved in any renegotiations. Should that normal fortitude be absent, then the pressure which the person with the ‘lesser fortitude’ experiences will not, in and of itself, be considered to be illegitimate. Actors in a given industry must be in a position to deal with the level of robustness normally expected to be present in that industry,

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and at that time. This is not to say, of course, that normal fortitudes cannot change over time or that they are always the same - regardless of the project. The construction industry has worked at lengths to change towards a more collaborative industry, as described in earlier chapters. Therefore, some of the new innovations in the industry, such as partnering, will bring about a different level of normal fortitude where such approaches require contract renegotiations, for example. Thus, to answer the question of whether or not illegitimate pressure is present, taking a view that it does not, once the weaker negotiating party exhibits the normal fortitude expected of a person working in the industry, it is necessary to consider each case on the narrower aspects of procurement route, form of contract used, as well as the sector of the industry in which the question arises.  

5.4. The Overborne Will Perspective

In the economic duress case of *Pao On and Others v Lau Yiu and Others*[^612] on appeal from the Court of Appeal in Hong Kong, the Privy Council of Lord Wilberforce, Viscount Dilhorne, Lord Simon of Galisdale, Lord Salmon and Lord Scarman, in deliberation of the third of three questions for consideration by the Board, which concentrated on the matter of there being consideration for a promise (indemnity in this case), and the enforceability of the guarantee if the consent (of the defendants) was induced by duress, stated the following:

> “Duress, whatever form it takes, is a coercion of the will so as to vitiate consent… In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after

[^612]: As detailed in Chapters 2 and 3.

entering the contract he took steps to avoid it. All these matters are… relevant in determining whether he acted voluntarily or not.”

Although, in the case at hand, their Lordships found that commercial pressure existed, but that no coercion was present, we nonetheless get a valuable statement of the nature of duress as being that which overcomes one’s free will.

It is observed by Korde\textsuperscript{614} that the boundary between fair and equitable bargaining between the parties as part of contract negotiations is breached where unlawful means are used by one or both parties:

“…(P)arties are free to negotiate the formation of a contract, and, the selection of the terms are the result of the free will of the parties. Freedom of contract admits consent between the contracting parties themselves…. The use of violence, fraud or other unlawful means can never be legitimate as these illegalities subvert the very notion of positive freedom.”

The freedom of contract principle, therefore, suggests that the freedom of both parties to choose and agree the terms of a contract prior to entering or modifying a contract is a cornerstone of whether or not a contract is enforceable. Should the parties agree a contract where one party was not in a position to exercise its free will and was forced to enter into the agreement, then the grounds for vitiating as a consequence are strengthened. This is well articulated by Cohen, where it is stated that:

“No legal system would legitimise use of violence, fraud or other unlawful means in the negotiating process; such methods subvert the very idea of positive freedom of contract. A contract concluded by violence or fraud is not a product of the free will of the contracting parties. Such a contract can be avoided, and, in extreme cases is not binding at all.”\textsuperscript{615}


Cohen also goes on to note that violence or fraud are likely in themselves to constitute torts, which may impose consequent liability on the contracting party, but that not every difference between the parties should require the intervention of the law; much rather that where illegitimate acts, such as violence or fraud, occur: these are the situations whereby relief ought to be available by the courts to the party subjected against such coercive methods. The law does not purport to accept that imbalances in power never exist between parties, nor that such imbalances will be absent from the negotiation processes:

“In the name of the bargaining ‘game,’ and in furtherance of the facilitation of bargains and promotion of commercial sector competition, the law must tolerate and encourage in some measure the use of pressure between contracting parties. And so it does.” 616

At one level, a measure of the effect of duress lies in it overcoming free-will, most particularly exemplified by the presence of the freedom of contract principle. A fundamental tenet of contract law is that parties must voluntarily enter into a contract for it to be enforceable. If parties did not freely consent to the contract, then surely it must be irrelevant what the nature of the pressure actually was, since where there is no full consent, there can be no enforceable contract. 617 This is a difficult position in reality, since, and as discussed previously, it is difficult to envisage a contract where one party was not at some degree of disadvantage to the other. Bigwood notes that because this may be the reality, it places a considerable challenge on the courts to satisfactorily resolve:

“Yet there are clearly limits to the use of comparative strength in contracting. Ostensibly in the name of fairness considerations, the strong must on occasion become subject to various checks on the exercise of their physical or, more commonly nowadays, economic strength. This especially obtains where the


exercise of such strength or power (through the use of ‘threats’) can be said to actively ‘exploit’ the weak or vulnerable and to jeopardise the integrity of the bargaining process itself. It generally becomes the unique but formidable burden of the doctrine of duress, therefore, to capture the distinction between the two classes of case - between illegitimate, coercive pressure, hence duress, on the one hand, and ordinary legitimate commercial pressure on the other."

This is a substantial limitation on the effectiveness of a party’s reliance on economic duress as a vitiating factor for modifications to construction contracts, and one which must be carefully considered should this thesis propose that the enforceability of contract modifications rely more heavily on the doctrine of duress than it currently does. The point at hand: that a distinction exists between normal bargaining inequality, which is accepted to exist. In particular it is imperative to attempt to make the distinction between mere ‘circumstances’ that limit one’s alternatives non-coercively and specific interpersonal threats that coerce. Helpful advice is given in Barton v. Armstrong:

“[I]n life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this the pressure must be one of a kind which the law does not regard as legitimate.”

Here we see further explanation of the importance of the presence of illegitimate pressure, as opposed to simply pressure which left no alternative but to act in a particular way. This distinction is especially useful, because construction is an industry characterised by pressure in a male-dominated culture. These industry features are likely to create situations whereby parties may be pressurised into situations in which there may be few if any choices, but the


important question is whether or not the pressure was illegitimate, or merely consistent with what may be considered to be normal or expected in an industry such as construction.

Therefore, the necessary approach is to acknowledge that in practice, people are subject to many different pressures, and there are many reasons why people enter into contracts. In essence, people rarely make a fully-freely-entered-into contract because a main reason for entering into the contract is that the parties need to enter into that contract. Therefore, in acknowledging this aspect of consent, it must also be examined, objectively, as to whether the pressure which was exerted was such as to cause the will to be overcome in a person exhibiting the normal fortitude expected of a person in such circumstances, or whether the pressure exceeded the norms expected to operate in the industry in question.

It can be concluded that, while full consent remains a vital aspect of an enforceable contract, this must be examined in the context of the specific circumstances since in reality there is unlikely to be any such thing as true full consent. Full consent must then be considered in the light of the pressure applied, specific to the circumstances, placing the emphasis once again on the legitimacy of the pressure applied. If it is possible to determine illegitimate pressure, and evidentially that that pressure caused the induction of the contract (“I would not have entered into the contract but for the application of that pressure”), then it is possible to vitiate a contract or contract modification for the presence of duress. 621

Indeed, and with this in mind, it is the view of Chen-Wishart that since all choices involved some form of curtailment of free will, the doctrine of economic duress should be further developed, and developed in such a way that limits the subjectivity of its analysis:

621 See Fiona Rossiter, ‘Excess pressure can kill the contract,’ (2006) 17 Cons Law 17 for detail of how this effects in construction cases.
“[T]here is nothing for it but to engage with the task of marking out the appropriate shape of economic duress. Suffice it to say that since scarcity is pervasive, all choices are constrained. It is impossible to generate a coherent theory of duress by reference to the internal psychology of the parties. To distinguish acceptable constraints from the unacceptable, we will need to appeal to factors external to the will of the parties.”\textsuperscript{622}

This is largely in line with the view of Atiyah,\textsuperscript{623} in a discussion on statements by the House of Lords in \textit{The DPP for Northern Ireland v Lynch},\textsuperscript{624} a case which, according to Atiyah, “totally demolishes the theory that duress operates by ‘overbearing the will’ of the party subject to it.” Atiyah refers to five leading, similar cases, where he notes that \textit{Lynch} is not cited by the authorities,\textsuperscript{625} even though this case finds that duress is a defence to a charge of aiding and abetting murder. In what is perhaps one of the most interesting discussions on the subject of duress and free will, Atiyah\textsuperscript{626} sets out the contentious view that, in “an oversight of monumental proportions”, the theory of the “overborne will” has been well and truly dismantled. The discussion centres around the thesis that duress does not eliminate free choice, but that instead it creates a choice between undesirable outcomes. This therefore implies that a choice exists, including in cases of extreme duress, even if those options are extremely unpalatable, a choice is nonetheless made. The notion that a person “has no choice” due to duress is


\textsuperscript{624} \textit{Director for Public Prosecutions for Northern Ireland v. Lynch} [1975] AC 653 at 690.

\textsuperscript{625} The \textit{Lynch} case is different in that it is a criminal case, however the issue of duress is central to it. The defendant, Mr Lynch, drove a car containing a group of Irish Republican Army men in Northern Ireland on a journey where they shot and killed a police officer. On his trial for aiding and abetting the murder there was evidence that he was not a member of the Irish Republican Army, and that he had acted unwillingly under the orders of the group, under the conviction that if he did not obey he would be shot. While the trial judge held that the defence of duress was not available to him and the jury found him guilty, and the Court of Criminal Appeal in Northern Ireland upheld the conviction, the House of Lords (though interestingly with Lord Simon of Glaisdale as one of the two dissenters), could no longer prevent the defendant from using duress as a defence, and ordered a retrial.

discredited, essentially making the bold claim that duress, in any shape or form, does not take away from the freedom of contract principle.

The kernel of Atiyah’s conclusion is that the existence of the overborne will theory has resulted in the wrong investigations being undertaken in duress cases. The discussion heretofore has revolved around whether or not the victim’s will was vitiated as a result of the duress. More correctly, according to Atiyah, it should be acknowledged that the victim made a choice, and that his will was never truly overborne since he always had a choice to make, and the discussion should instead examine the nature and acceptability of the choices with which he was presented. In this context, and as a brief aside, election of performance and non-performance of contracts referred to previously is worthy of consideration by contrast. While it is acknowledged that in English law it is an illegal act to deliberately breach a contract, one must ask, in a practical sense, does electing performance or non-performance of a contract actually constitute any more than the provision of choices to the other party? Would it better serve this area of the law to consider the nature and acceptability of these choices (like any other choices) than to merely prohibit them?

Atiyah’s view does not exist without criticism, and has been challenged to some degree. In a direct response to Atiyah’s theory referred to in the foregoing, Tiplady,' launched a direct and incisive critique of Atiyah’s salient points. The first argument is levelled against Atiyah’s analysis of the willingness of the House of Lords in Lynch to dismiss the “overborne will” theory. Tiplady holds

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that the central issue is not one of no choice but of effective choice. He refers, in particular, to Lord Scarman’s remarks in *Pao On and Others v Lau Yiu and Others*,\(^{630}\) where he explained that “a compelled will is not a will destroyed or lacking, but a will deprived of effective choice. The victim submits because he has no realistic alternative.” The notable counterpoint to this though, is that an alternative, however realistic or otherwise, remains an alternative, and since a choice is made, the will cannot be therefore overborne.

Tiplady’s response to this type of criticism of his theory is that if an alternative is not realistic, a person has no choice. He cites the example of “Pay the fine or go to jail” as being one that the person may make a free choice over, since either option, though possibly of relative palatability to each other, are viable alternatives. This compares with the “Your money or your life” scenario where Tiplady would argue that there really is no decision to make since a person could not choose to give their life over their money. In such circumstances, there being no alternative, no choice to be made, the will is completely overborne and consent is vitiated.\(^{631}\) He sums up with the following:

“The essence of duress is a threat, and all threats offer a choice. In making this choice a rational individual obviously ‘intends’ the one rather than the other, but to deduce that he thereby, in all situations, exercises his free will, or gives his ‘true’ consent, or that his action is ‘voluntary’ begs too many questions.”

In this closing statement, Tiplady once again acknowledges that duress involves an element of choice, but re-asserts that this choice is not exercised under free will. Of course, this again raises questions about the nature of free will in itself. When is one truly exercising free will? Is there ever a choice to be made completely absent of constraint which would make it genuinely free? It is more likely that every choice has degrees of imperfection, thus constraining the ability


\(^{631}\) *Cf* Reiter, ‘Courts Consideration and Common Sense,’ (1977) 27 Univ Toronto LJ 439 at 446.
of the chooser to freely choose either option without being better or worse off in some shape or form.

The response by Atiyah to Tiplady concludes this particular dialogue between the two commentators, and is a direct and targeted retort to the remarks made by Tiplady in the previous issue of Law Quarterly Review. Here, Atiyah directly addresses the matter raised by Tiplady, most notably relating to the existence or otherwise of the “overborne will” theory.

Atiyah reverts to an analysis of The DPP for Northern Ireland v Lynch, stating his view that two theories were put before the members of the House of Lords: namely, “the traditional theory that a person acting under duress does not intend or will the result, that he does not perform a voluntary action at all” on one hand, and “the alternative theory, that even effective duress does not deprive a person of his free will, or his power to choose, even though one of the alternative choices before him may be so overwhelmingly bad that in popular speech one might say, ‘He had no choice.’” Atiyah immediately notes that in Lynch, “All five members of the House of Lords quite clearly rejected the first theory and accepted the second.”

Atiyah, finally, reminds us of his central thesis: that the issue of duress should be centred on “improper and unacceptable threats” rather than the will overborne. In this eventuality, the focus is on the the very complex area of the acceptable and permissible limits of coercion which society can tolerate. The key to all of this more correct analysis, in Atiyah’s view, is to acknowledge that the will is not overborne by duress, choices are made, and those choices must be examined in order to decide what is appropriate for society to countenance.


It does not seem unreasonable to conclude, between these views, that the issue can be reduced to one of available alternatives. From this perspective, it is hard to imagine a situation where a person does not have some alternative to the most dire circumstances presented to them. Even the “your wallet or your life” scenario presents an alternative. If it is the case that there are always alternatives, then the argument is not so much about their existence (since they are omnipresent) but rather about their viability. It would seem to be a logical conclusion to view even the “your wallet or your life” situation as not really presenting an alternative, in the viable sense, since although a theoretical choice of alternatives exist, in reality and in practical terms, there is no choice. Thus, a person may exercise their free will amongst choices which are practical and comparable (to some extent at least), but not those which are so drastic by comparison as to not actually represent real choice. It is this difference which is at the heart of determining the existence of illegitimate pressure causing compelled will which characterises duress.

Essentially though, and notwithstanding the foregoing analysis, the issue of duress remains rooted in the areas of overborne will, availability of options, and acceptability of the pressure applied. It is worthwhile considering how these factors impact on a construction contract modification context. The application of pressure can be viewed as being almost a given. Despite the efforts to make construction a more collaborative industry, as discussed in Chapter 3, it is still characterised by the type of confrontation which result in robust negotiation of contracts and contract modifications. In many of these circumstances, choices are characterised by their degrees of unpalatability. In other words, the various options open to parties in renegotiation of construction contracts may only vary in terms of their palatability: none may be ideal, and the choice becomes one of the “lesser evil.” It is the view here that the greatest scope for potential duress in construction contract modification lies in the illegitimacy of the pressure applied. This can take the form of an implicit threat of non-performance, or forcing agreement through threatening something unconscionable (such as extortionately
- as opposed to fair and reasonable - high prices for a modification when there is no practical alternative open to the threatened party, and where an understanding exists that the parties will work together in good faith).

5.4.1. The Effect of Pressure on an Individual

[T]he legitimacy of the pressure is not what is important, but rather its impact on the 'victim.'  

The very nature of duress is that it involves the victim being subjected to illegitimate pressure, which is a factor causing him to consent to the terms of the contract or contract modification, because there is no alternative open to him. This notion is well stated by Bigwood, in the context of pressure being illegitimate in a matter relating to contract modifications:

“Courts, however, must then turn to consider more closely the independent question of whether such pressure, in all the circumstances, can be said to have compelled [the victim]… into the transaction. For despite the illegitimate pressure, [the victim’s]… submission to the modification may, all things considered, be adjudged to have been a ‘reasonable’ course of action for [the victim] to have taken, especially given his alternatives of finding substituted performance, litigating his rights…”

This suggests that although pressure may have been applied (which Bigwood holds is “invariably ‘illegitimate’ for the purposes of the ‘pressure’ arm of the two-pronged duress inquiry, for doubtless it is to commit a legal ‘wrong’”), the contention is that the resultant (albeit forced or coerced) course of action leading to consent to the contract or modification to the contract, may be a correct course

635 NAV Canada v Greater Fredericton Airport Authority Inc. [2008] 290 DLR (4th) 405 at 50.

636 Rick Bigwood, ‘Economic duress by (threatened) breach of contract,’ LQR 2001 117.

637 DSND Subsea Ltd (formerly DSND Oceantech Ltd) v Petroleum Geoservices ASA [2000] BLR 530 QBD TCC.
of action for the victim to take. In taking this course of action, the victim is now choosing freely to enter into the contract since he believes it is now in his best interests to do so, leading to an altered form of free will, shaped by the changing landscape of the altered circumstances the victim (and indeed the perpetrator) now find themselves in. So while free will, in its conventional sense, is removed (in that it no longer exists without interference in the form of pressure), the resultant decision to agree to contract is still freely done, and may indeed be in the best interests of the victim of the coercion. In essence, the resultant point is that the nature of duress can be shown to overcome a victim’s free will in so far as duress is shown to exist where the consent of the victim has been obtained by illegitimate pressure.638

This is in contrast with the view that whether the outcome is in a party’s interests or not, the issue is whether the party has had their consent overcome. A party who has benefited from duress would not presumably be claiming any relief from that which they were induced to do, but that is a distinct point from whether there was duress or not. That the outcome of the transaction is of benefit or detriment to the victim may impact their desire to sue, but it is at the point of the agreement that it is necessary to determine whether duress exists or not.

Referring again to *NAV Canada v Greater Fredericton Airport Authority Inc*,639 perhaps the greatest contribution that this judgment makes to jurisprudence lies in its attempt to reduce the framework for the assessment of economic duress to a more objective and definable matter than heretofore may have been more prevalent. In essence, Robertson, JA condenses economic duress, in the context of contractual modifications, to the critical factor of:

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“[W]hether the victim had any practical alternative but to capitulate to the demand…”\footnote{MH Ogilvie, ‘Economic duress: an elegant and practical solution,’ (2011) 3 JBL 239.}

This suggests that the notion of the will overborne is indeed relevant, but in the spirit of \textit{practical} alternative, rather than merely the existence of \textit{any} alternative. Robertson, JA continuously repeats the view that contract variations, if formed without duress, are the product of an agreement. It is this agreement theme which forms the basis of his determination of the framework for economic duress. If a person is under pressure and has no practical alternative but to vary the contract, and there is no evidence of consent, this points to the variation having been agreed to under economic duress. Or, in the words of Ogilvie:\footnote{Ibid.}

“The starting point for any analysis of economic duress is the requirement for agreement to the exchange that constitutes all contracts. Freedom of contract, that is, freedom to enter contracts at will and with voluntary consent, remains the first and fundamental principle of exchange in liberal democracies. The goal for any test for economic duress is to determine as best as possible whether the complainant voluntarily agreed to the contract modification or not.”

The distinction Robertson JA has made between new contract formation and contract modifications is described by Ogilvie:\footnote{[2008] 290 DLR (4th) 405, at 51.}

“[I]n modification cases, the original contract has established the complainant’s expectations which will have to be revised downward when a contract is modified.”

Robertson JA expands on this framework by describing the threshold requirements, (pressure plus no practical alternative), the conditions precedent upon which a finding of economic duress is dependent initially. Once these...
conditions are met, a finding of economic duress does not automatically follow:643

“Once these two threshold requirements are met, the legal analysis must focus on the ultimate questions: whether the coerced party ‘consented’ to the variation. To make that determination three factors should be examined: (1) whether the promise was supported by consideration; (2) whether the coerced party made the promise ‘under protest’ or ‘without prejudice’; and (3) if not, whether the coerced party took reasonable steps to disaffirm the promise as soon as practicable.”

What is interesting about Robertson’s JA judgment above, is that, upon examination, the view that an absence of available alternatives is the key factor is especially insightful, given that other factors are reducible to that also. For instance, as Ogilvie644 explains, independent legal advice does not predicate voluntary agreement, since the advice could well be that there is no other practical alternative but to accept the modification. In this way, what the New Brunswick Court of Appeal has done is to reduce economic duress to its essential component of whether the complainant was coerced, and to remove the irrelevant considerations.

This framework is welcomed by Ogilvie in the following terms:645

“It is submitted that this test proposed by the N.B. Court of Appeal is both easier to manage and to prove. It requires pressure, such as a demand or threat, and an absence of practical alternatives. Both are questions of fact of the sort courts typically assess in contract litigation in contrast to deciding where actions otherwise legal might occasionally be considered illegitimate … While this test lacks the imprimatur of a top court, it is workable and should yield fair outcomes when initial contractual expectations are dashed by overbearing parties.”


However, it is by no means a perfect framework, and while the threshold factors are readily determinable as matters of fact, no guidance is offered by Robertson JA as to what level of consent to variation is required from the additional analyses of consideration, promise made under protest or reasonable steps taken to disaffirm the promise as soon as practicable. This difficulty is captured by Ogilvie, as described below:

“[T]he test proposed by the N.B. Court of Appeal has stripped away all irrelevant considerations to what is essential to determine whether the complainant was coerced into a contractual modification involuntarily so that the requisite consent for a contract was lacking. But the question the court did not address was the extent to which this absence of consent matters.”

Notwithstanding this reservation, there is a clear and logical rationale behind Robertson, JA’s approach to the existence of economic duress, and one which transcends subjectivity such as whether pressure was illegitimate or not. It would appear to be a welcome modernisation of the combined usage of consideration and economic duress, which retains the spirit of the doctrines through reduction, without losing the degree of certainty which the doctrines bring to contractual proceedings.

However, one of the key factors in this judgment is the assertion that any pressure, coupled with limited alternatives for the pressurised party, could be sufficient. Robertson JA states himself to be in agreement with Ogilvie, “when she writes that the legitimacy of the pressure is not what is important but rather its impact on the ‘victim’: ‘Forbearance and Economic Duress: Three Strikes and You’re Still Out at the Ontario Court of Appeal’, at para. 26.”
5.4.3. Criticisms of the Overborne Will Perspective

If there is no requirement for the pressure to be illegitimate, but rather that the pressurised party is impacted by the pressure, then that raises some concerning issues. Legitimate pressure, as may be expected to be present in commercial negotiations and renegotiations, (and likely in a construction contract modification setting) surely cannot always give rise to economic duress? If it is established that duress requires coercive pressure in the form of an illegitimate threat which has the effect of reducing options to the coerced party,646 and that pressure induces the contract, then it must be impossible to remove the element of subjectivity and to only determine the existence of economic duress based on the factual presence of pressure which impacts the “victim.” This approach may be too simplistic for what is a much more nuanced aspect of contract law. Parties feel pressured in negotiations for various reasons: real and perceived. It is unlikely that there are many situations whereby both negotiating parties are of precisely the same level of bargaining power, thereby giving rise to an almost invariable imbalance of power, likely to lead to one party experiencing greater pressure than the other (and from the other), but importantly the pressure experienced is legitimate in the sense that it is not illegal, immoral, nor intended in bad faith. If the test for economic duress according to NAV Canada647 is that pressure is applied without considering its nature (bona fides, mal-a-fides of the pressuring party), then this is surely not true in all circumstances and industries.

It is possible to now assert that duress exists when there is illegitimate pressure (in the form of illegal, immoral, unconscionable pressure, through the exertion of undue influence) which causes the will to be overborne (as evidenced by lack of alternatives - a threat not an offer), which in turn induces the contract or contract modification. Robertson, JA in NAV Canada v Greater Fredericton Airport Authority Inc. [2008] 290 DLR (4th) 405.

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647 NAV Canada v Greater Fredericton Airport Authority Inc. [2008] 290 DLR (4th) 405.
Authority Inc,\textsuperscript{648} and Ogilvie\textsuperscript{649} are suggesting that there is no necessity to demonstrate the first component: illegitimate pressure. Such a move has implications in the creation of situations whereby an analysis of the motivation of the pressure, (which causes the will to be overborne and ultimately leading to a contract or revised agreement), is omitted. By failing to understand the nature and motivation of the pressure, it is surely taking a narrower and more objective view of the presence of economic duress from the point of view of its effects rather than its intent. While this may be appealing in terms of what could arguably be its more factual nature, by failing to assess the pressure which instigated the entire process leading to the alleged duress, inconsistencies may present themselves. There is a clear danger in analysing effects on voluntariness to agree to contract or contract modification if it is examined from the perspective of the “victim” and how their freedom of contract was affected. An obvious problems with this approach is that two parties, experiencing exactly the same “pressure” in the same circumstances (from an objective point of view taken by the “pressurising” party - who is acting in good faith), could find that it affects them in different ways: one may find that their freedom of contract was reduced; the other may find that it was not impacted in any way. According to Robertson JA, duress would be determined by examining the impact of the pressure on the “victim,” meaning that one contract modification could be enforced, while the other (identical, from the perspective of the “pressurising” party) could be vitiated due to the presence of duress. This is a situation which would be quite possible in a construction sense, where a main contractor could be renegotiating terms with various subcontractors; treating each with an equal amount of pressure, but this could constitute duress for some, while not for others. In a practical, commercial sense, one must wonder if such an uncertain eventuality is workable. The nature of the pressure - and whether it is abusive and taking unjust advantage of the alleged victim - must surely be at the heart of any determination

\textsuperscript{648}[2008] 290 DLR (4th) 405.

\textsuperscript{649} MH Ogilvie, ‘Economic duress: an elegant and practical solution,’ (2011) 3 JBL 239.
of duress. Additionally, it would only seem reasonable to conclude that all of this must be considered in the context of the industry in question, since it is unlikely that the same degree of pressure would be viewed with exactly the same level of tolerance in all industries and circumstances.

5.5. Attempts to Examine Duress from an Inequality of Bargaining Power Perspective

Before conclusions can be drawn on analysing duress in construction contract modifications, it is necessary to further examine the concept of inequality of bargaining power. It has already been discussed that there is generally an inequality between the parties to an agreement or contract modification, and it has been put forward that once the pressure is legitimate (as determined by the norms of the industry and the normal fortitude to be expected of an actor in that industry), then the relative power between the parties does not, in and of itself, actually matter in terms of determining the existence of duress. A conclusion of the previously-referred to dialogue between Atiyah650 and Tiplady651 and the discussion above on pressure resulting in limited alternatives in *NAV Canada v Greater Fredericton Airport Authority Inc,*652 is that if a choice is always made between sometimes unpalatable options, the nature of the acceptability of those options must be examined. Inherent in this conclusion is the notion that a relationship exists between economic duress and bargaining power. Duress can be viewed as the extreme form of inequality of bargaining power; though not all inequality of bargaining power may be considered as duress. It could be said that it is not the inequality which gives rise to the duress (since inequality, to some


degree at least, will exist in most cases anyway), but how that inequality is used by the party with the greater power.

Lord Denning is credited with attempting to develop the doctrine of inequality of bargaining power: a doctrine which resulted in analyses of the role in which the respective bargaining powers of parties to a contract have. The doctrine itself, however, was not universally or even widely accepted, and has since been overturned on some notable occasions. Notwithstanding this, there is much to be learned from Lord Denning’s reasoning in his development and statement of this doctrine, and its relationship to duress cannot be ignored for the purposes of this work.

It was in the Court of Appeal case of *Lloyds Bank v Bundy*\(^ {653}\) that Lord Denning first gathered and stated his general principle of inequality of bargaining power. Before delving into the creation of a new doctrine, Lord Denning set out the situation as it currently stood at that time. Importantly, he noted firstly in this regard, that “in the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it”. He held that the common law does not interfere into such hard cases, should they occur, but that the regulation of such matters as

\(^{653}\) *Lloyds Bank Ltd. v Bundy* [1975] QB 326. In this case, the defendant, Mr Bundy had guaranteed his son’s plant hire business overdraft with Lloyds Bank and charged his family farm to the bank to secure the loans. The son’s business’ condition deteriorated, and the bank foreclosed on the loan and sought to evict Mr Bundy in order to sell the house to compensate for their losses, which were incurred by Mr Bundy’s son’s company’s failure. This was in line with the agreement which Mr Bundy (Senior) signed, and in many ways, while an unfortunate sequence of events for the Bundys, was rather unremarkable on the whole. What lead to the statement of the doctrine of inequality of bargaining power was the fact that while Lloyds bank were acting in their own interests in protecting their loan to Mr Bundy’s son, they had a conflict of interest since Mr Bundy himself also banked at that same branch of Lloyds, and the bank had a fiduciary duty to him also. During the formation of an early guarantee agreement made by the bank for a smaller overdraft, the bank official had left the documents with Mr Bundy for his solicitor to examine, but in the subsequent guarantee formation, a new bank bank manager was in charge, and he arrived to Mr Bundy’s house with documents ready for signing and did not afford Mr Bundy the opportunity to allow his solicitor, or indeed anyone, to examine the terms and offer advice. The lower court, while acknowledging that the Bundys’ situation was pitiful, could not grant relief and held that Lloyds’ action to evict Mr Bundy should be upheld. Bundy appealed, and the appeal was allowed. This case contained some of the typical language used by Lord Denning, and his judgment in this cases is one of the oft-cited example of Lord Denning as “the people’s judge”. Of particular note is his introduction which casts the scene of the matter in an almost poetic style: “Broad chalk is one of the most pleasing villages in England. Old Herbert Bundy, the defendant, was a farmer there. His home was at Yew Tree Farm. It went back for 300 years…”
interest rates which moneylenders may charge has been left to Parliament to enact
statutorily. Lord Denning proceeded to note, however, that notwithstanding the
above, there may be exceptions to this general rule:

“There are cases in our books in which the courts will set aside a contract, or a
transfer of property, when the parties have not met on equal terms - when the one
is so strong in bargaining power and the other so weak - that, as a matter of
common fairness, it is not right that the strong should be allowed to push the weak
to the wall. Hitherto those exceptional cases have been treated each as a separate
category in itself. But I think the time has come when we should seek to find a
principle to unite them … I only go to those [contracts] where there has been
inequality of bargaining power, such as to merit the intervention of the court.”

In developing the doctrine of inequality of bargaining power, Lord Denning
outlined and described the five categories which should be covered by this
combined and unified classification.655

The first category is that of “duress of goods”, whereby a person withholds the
property of another until such time as the latter pays the former a sum of money.

The second category is that of the “unconscionable transaction.” Such a scenario
might occur where an “expectant heir”, while awaiting his due fortune, might
sign over the expected asset in advance of its receipt for ready cash to satisfy an
urgent and immediate need; at a value far below its actual worth. Lord Denning
describes this category as extending “to all cases where an unfair advantage has
been gained by an unconscientious use of power by a stronger party against a
weaker”.


655 See also Rosalind Reston, Undue influence: “… the world of doctrine, not of neat and tidy
rules,” (1990) 5 JIBL 80-84.
The third category is that of “undue influence,” and has two sub-categories. The first of these sub-categories is where the stronger party has been guilty of some fraud or other wrongful act and has used that to gain an advantage over the weaker party; as compared with the second sub-category where the stronger party has not engaged in unlawful behaviour to gain some advantage over the weaker party, but has used their relationship in order to glean that advantage. In his description of this latter sub-category, Lord Denning explicitly refers to some relationships for which there is a presumption of undue influence: namely that of parent over child, solicitor over client, doctor over patient, spiritual advisor over follower.

In support of this, he cites the judgment of Lord Chelmsford LC, in *Tate v Williamson*\(^{656}\) where it is stated that:

> “Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.”

The fourth category is that of “undue pressure.” This can describe a situation where one party stipulates for an unfair advantage to which the other has no option but to submit. An example of such pressure could be where an employer as the stronger party, refuses payment to a builder, the weaker party for work completed, unless the builder gives the employer some added benefit. This is a scenario which clearly has some resonance with *Williams v Raffey Brothers and Nicholls (Contractors) Ltd.*\(^{657}\)

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\(^{656}\) *Tate v Williamson* (1866) 2 Ch App 55.

The fifth category is that of salvage agreements, and refers to a situation where inequity of bargaining power might exist where a ship is sinking and the rescuer is in a strong bargaining position. The Court of Admiralty\textsuperscript{658} has always recognised this possibility, and has a rule to deal with such occurrences:

“If the parties have made an agreement, the court will enforce it, unless it be manifestly unfair and unjust; but if it be manifestly unfair and unjust, the court will disregard it and decree what is just and fair.”

Lord Denning used these aforementioned categories to reach a resultant, united general principle of inequality of bargaining power. By way of introducing this principle, he suggests that all of the above categories have within them a common theme: that being “inequality of bargaining power”. His noteworthy statement of this doctrine is given below:

“English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressure brought to bear on him by or for the benefit of the other. When I use the word “undue” I do not mean to suggest that the principle depends on proof of any wrongdoing … I have also avoided any reference to the will of the one being “dominated” or “overcome” by the will of the other.”

This passage in Lord Denning’s judgment essentially sets out what he considers to be the doctrine of inequality of bargaining power; who should benefit from relief due to their inferior position, and in what circumstances relief should be permissible. It is especially interesting to note that undue influence and the notion of the overborne will are deliberately excluded from this doctrine. However, what is stated here really is little more than the “unconscionable transaction” category referred to above.

\textsuperscript{658} Aberblom v Price, Potter, Walker & Co (1881) 7 QBD 129.
In looking at some of Lord Denning’s earlier cases, it is possible to get a clearer insight into his thinking in the development of this general principle. An examination of *D&C Builders v Rees*,\(^\text{659}\) raises some interesting points. This Court of Appeal case centred around the payment to a builder for less that the amount owed, and has interesting resonances with *Williams v Roffey Brothers and Nicholls (Contractors) Ltd*\(^\text{660}\) as mentioned previously; something which a brief description of the facts of the case might help enlighten.

The facts pertaining to *D&C Builders v Rees*\(^\text{661}\) are summarised as follows: The plaintiffs, who were general building contractors, claimed money outstanding as the balance owing for work done and materials supplied in respect of construction work carried out to the defendant’s shop. The plaintiffs were in serious financial difficulty, and, having not received payment from the defendant, were offered a reduced amount by the defendant’s wife on condition that the reduced amount would be accepted in settlement, and stating that if the defendants did not accept this amount, they would receive nothing. The plaintiffs told the defendant’s wife that they had no choice but to accept this reduced amount, which they subsequently received by way of cheque, which they received upon furnishing a receipt stating that the sum (i.e., the reduced amount) was received “in completion of the account”. The plaintiffs claimed for the balance, which was met by the counterclaim of poor workmanship on the defendant’s part. At first instance, it was held that there was no consideration to support the agreement to accept the reduced balance, and it was found in favour of the plaintiffs. The subsequent appeal was also dismissed, where it was held that the “payment by a debtor, whether in cash or by cheque, of a lesser sum than the amount of the debt was not a settlement of the debt which was binding on the creditor”\(^\text{662}\).

\(^{659}\) *D&C Builders Ltd v Rees* [1966] 2 QB 617.


\(^{661}\) *D&C Builders Ltd v Rees* [1966] 2 QB 617.

\(^{662}\) Ibid, at 618.
The relevant points (to this work) that Lord Denning noted in the chronology of this case were that a) D&C was in desperate financial straits, b) if it did not get even the reduced amount of money offered by the defendant’s wife, it would be bankrupted, and c) it decided to accept the reduced amount with a view to deciding about the remainder afterwards.\textsuperscript{663}

In distinguishing this case from some others\textsuperscript{664} Lord Denning refers to the concept of true accord between debtor and creditor:

“Where there has been a true accord, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor acts upon that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance.” \textsuperscript{665}

This concept is derived from the notion of what is equitable in such situations. Extending this idea to the case at hand,\textsuperscript{666} Lord Denning notes that it seems to him that there was no true accord. “The debtor’s wife held the creditor to ransom,” sums it up quite succinctly. In particular, Lord Denning took issue with the defendant’s comments to the plaintiffs that the reduced amount should be accepted by the former, since if they did not accept it, they would receive nothing, and the reduced amount “is better than nothing.” Lord Denning points out that the defendant “had no right to say any such thing.” More properly, she (the defendant’s wife) should have stated that they were unable to pay the full amount at present, and offered the reduced payment on account. The noteworthy point is that in taking the course of action chosen, the defendant effectively put

\textsuperscript{663} In his signature style, Lord Denning, as Master of Rolls, begins his judgment with the opening phrase: “The plaintiffs are a little company. ‘D’ stands for Donaldson, a decorator, ‘C’ for Casey, a plumber.”

\textsuperscript{664} Sibree v Tripp (1846) 15 M&W 23 (distinguished); Goddard v O’Brien (1882) 9 QBD 37 (not followed).

\textsuperscript{665} D&C Builders Ltd v Rees [1966] 2 QB 617 at 625.

\textsuperscript{666} Ibid, at 617.
undue pressure on the creditor by insisting “we will pay you nothing unless you accept [the reduced payment] in settlement.” When she did this, she made a threat to break the contract (by paying nothing), and her reasons for making this threat were to for the plaintiffs to engage in behaviour contrary to his will. As Lord Denning concludes, “No person can insist on a settlement procured by intimidation.”

On reflection of the facts and judgments of *D&C Builders v Rees*, it becomes clear that Lord Denning’s arguments are unsustainable and that the case can be rightly resolved on the lack of enforceability, since there is undoubtedly illegitimate pressure applied in this instance. Although, it is reasonable to say that there is evidence here of the groundwork for the general principles of the so-called doctrine of inequality of bargaining power stated by Lord Denning in *Lloyds Bank v Bundy*. Many of the essential elements, such as entering into a contract upon terms which are unfair, inadequate consideration, when bargaining power is “grievously impaired by reason of his own needs or desires,” coupled with “undue influences or pressures brought to bear … by or for the benefit of the other,” are quite apparent in *D&C Builders v Rees*, and indeed form the basis for Lord Denning’s decision not to allow the appeal. Such circumstances warrant that the person subjected to the above should granted relief in English law, and in *Lloyds Bank v Bundy*, Lord Denning had all the necessary ingredients in that case in which to formulate and state the principle of inequality of bargaining power, which he had, in previous cases, been endeavouring to gather into a single thread of a doctrine.

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668 [1966] 2 QB 617.


According to some commentators, Lord Denning envisaged that this new doctrine of inequality of bargaining power would become the guiding principle to unify previously discrete areas of law and provide a basis for the solution to a wide range of problems. However some appellate courts have given it a somewhat less than warm reception. *Pao On v Lau Yiu Long* is worth discussing in this regard firstly, where the doctrine of inequality of bargain power was met with mild rebuff.

This Privy Council of Hong Kong case of *Pao On* related to an agreement by the plaintiffs to sell their shares in a private company incorporated in Hong Kong, to a company belonging to the defendants in consideration of the issue to them of shares in the purchasing company. In order to ensure that the market value of the shares was not unnecessarily depressed, the plaintiffs agreed not to sell 60 percent of the shares for a certain, specific period of time. In order to prevent the plaintiffs from becoming severely disadvantaged should the share price experience a catastrophic drop in value during the restricted period, and the plaintiff having agreed not to dispose of the shares during the restricted period, the defendants agreed to purchase the shares at a price of US$2.50 per share at the end of the restricted period. The agreement was executed, but soon afterwards, the plaintiffs realised that the agreement, in effect, forbade them the opportunity to extract value from the shares should they rise during the restricted period. They therefore refused to complete the main agreement, (i.e., to sell the shares in the first place) if the defendant did not acquiesce to substitute the subsidiary agreement (i.e., the $2.50 buy-back at the end of the restricted period) with a true guarantee (by way of indemnity). Since the defendant had just gone public with the announcement of the main acquisition, if the deal then fell through, it was considered by the defendants that their market confidence would

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674 Ibid.
suffer. The defendants had to decide whether to yield to the plaintiff’s demand in order to complete the sale of the business. The main agreement was executed, and afterwards the value of the shares dropped below the $2.50 threshold. The plaintiffs claimed for their indemnity, which was refused by the defendants on the grounds that the consideration for the indemnity agreement was past consideration, and that any such agreement was voidable by reason of the economic duress applied by the plaintiffs.675

Lord Scarman, delivering the judgment on behalf of the Privy Council, mentions Lord Denning’s principle of inequality of bargaining power in a somewhat dismissive manner. His reference to Lord Denning is based on the Privy Council’s non-acceptance of the defendants’ submission that “the ground can be extortion by the abuse of a dominant bargaining position to threaten the repudiation of a contractual obligation.” In fact, in this regard, he notes particularly that Lord Denning’s view in this regard is at odds with the majority view in Williams v Williams.676

However, Lord Denning continued to repeat his view that the law recognised a principle of inequality of bargaining power, and this is evident in some of his subsequent cases. In Arrale v Costain Civil Engineering Ltd677 for instance, a case relating to the sufficiency of compensation paid an employee of the defendant, a construction company, who suffered the loss of an arm during the course of conducting duties required of him by the defendant, Lord Denning, again refers to the notion that during the creation of the terms of the settlement, a degree of inequity existed since there was no equality of bargaining power

675 Case description based on the available case reports[1979] All ER 65, [1979] 3 WLR 435, as well as judgment read by Lord Scarman on behalf of the Privy Council (Hong Kong).

676 [1957] 1 All ER 305. This was a matrimonial Court of Appeal case relating to consideration and pre-existing duty; in particular as to whether maintenance agreement between separated husband and wife could be enforced, and as to whether the wife’s undertakings to indemnify her husband against debts incurred by her inter alia, constituted good consideration.

between the parties, and there was therefore no true accord or satisfaction. This view was shared by Lord Denning’s colleague on the Court of Appeal, Stephenson LJ, but was not shared by the third member of the Court, Lane LJ.

Shortly afterwards, the case of *Levison v Patent Steam Carpet Cleaning Co Ltd* came before the Court of Appeal and Lord Denning. This case is of note due to Lord Denning’s rationale and reasoning for overturning the lower court’s decision. The plaintiffs owned a carpet to the value of £900, and procured the defendants to clean same. Upon collection of the carpet from the plaintiffs’ home, a representative of the defendant company gave the plaintiff a form to sign, which the plaintiff signed without reading the terms and conditions contained in small print above the space for his signature. By signing, he accepted the terms and conditions. Notable clauses in the terms and conditions were that the maximum value of carpet was deemed to be £40, and that goods were “expressly accepted at the owner’s risk.” The carpet was never returned by the defendants, and they told the plaintiff’s insurers that under the terms and conditions of the contract, their liability was limited to £40. The plaintiffs sued, and were awarded £900 on their claim for the value of the un-returned carpet. The defendants appealed, and their appeal was dismissed.

While the Court of Appeal held that while the goods were expressly accepted at the owner’s risk gave exemption from liability for negligence, they did not excuse liability for fundamental breach of the contract. This was most certainly the case here, in that a fundamental breach occurred. However, Lord Denning did not base his judgment on this point alone. He brought into the courts, once again, the principle of inequality of bargaining power.

Specifically in this instance is Lord Denning’s application of the inequality of bargaining power principle to consumer transactions and standard forms of

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contract. He refers to the fact that the conditions of the contract or sale were on the back of a standard form, and that the “customer was asked to sign them without being given any opportunity of considering them or taking objection to them.” While referring to Instone v A Schroeder Music Publishing Co Ltd where Lord Diplock also commented on the inequality of bargaining power, Lord Denning describes how in many cases the negotiation of a transaction between a stronger party and a weaker party does not even come down to a “Take it or leave it” scenario, but much more insidiously, the weaker party “is simply presented with a form to sign, and told ‘Sign here’; and he so does. Then, later on, when the goods are lost or damaged, the form is produced: and the stronger party says: ‘You have no claim. Look at the conditions on the form. You signed it and are bound by those conditions!”

More severe criticism than that in Pau On v Lau Yiu Long of Lord Denning’s doctrine of inequality of bargaining power was evident in the House of Lords case National Westminster Bank Plc v Morgan. The particular criticism of Lord Denning’s doctrine related to his creation of a new principle or doctrine in Lloyds Bank v Bundy, which the House of Lords hold was not actually what determined the court’s judgment in that case.

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Prima facie, National Westminster Bank Plc v Morgan\textsuperscript{685} is a similar case to Lloyds Bank v Bundy.\textsuperscript{686} It relates to loans secured against property and the complication of associated business debts. It includes the question as to whether or not the bank manager acted with undue influence in securing the loan agreement. The case began at first instance, where the court held that the bank did not exert undue influence over the defendant, and awarded possession of the property. The court found that the defendant was indeed anxious not to lose the home, but that the transaction had not been manifestly disadvantageous to the defendant, who had known that there was no other way of saving her house at that time. It also found that the circumstances of the mortgage agreement were not such as to warrant the seeking of independent legal advice, and that as a consequence, the bank did not act in any way with impropriety since there was not such a confidential relationship between the bank and the defendant so as to give rise to the presumption of undue influence. The Court of Appeal allowed an appeal by the defendant in which the lower court’s decision was overturned.

The House of Lords then allowed the appeal by the bank, holding that the principle which justified the setting aside of a transaction on the ground of undue influence, but only if the transaction involved was shown to be “wrongful in that it had constituted a manifest and unfair advantage to the person seeking to avoid it” was not shown, and that the relationship between the bank and the defendant had not gone beyond the normal business relationship of banker and customer, and that the transaction had not be disadvantageous to the defendant.

Of particular relevance is the House of Lords’ treatment of Lord Denning’s principle of inequality of bargaining power. Lord Scarman, delivering the lead judgment for the House of Lords, points to his belief that the while Lloyds Bank v

\textsuperscript{685} [1985] AC 686.

\textsuperscript{686} [1975] QB 326.
Bundy was the correct decision, it was not for the reasons outlined by Lord Denning in his judgment. Indeed, Lord Denning was not the deliverer of the leading judgment in *Lloyds Bank v Bundy*. That honour fell to Sir Eric Sachs. Lord Scarman notes that “The opinion of the Master of the Rolls [Lord Denning] … was not the ground of the court’s decision, which was to be found in the view of the majority, for whom Sir Eric Sachs delivered the leading judgment.”

Lord Scarman proceeds to outline that the general principle of inequality of bargaining power, while being a principle formulated by Lord Denning in *Lloyds Bank v Bundy*, is not, nor never was, a true principle of the law. Exemplifying this, he states that counsel for the respondent (Mrs Morgan) has not sought to rely on this general principle, and explains that the doctrine of undue influence is more appropriate and is what constituted the majority view in *Lloyds Bank v Bundy*.

“The doctrine of undue influence has been sufficiently developed not to need the support of a principle which by its formulation in the language of the law of contract is not appropriate to cover transactions of gift where there is no bargain. The fact of an unequal bargain will, of course, be a relevant feature in some cases of undue influence. But it can never become an appropriate basis of principle of an equitable doctrine which is concerned with transactions “not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act” (Lindley LJ in *Allcard v Skinner*, at p. 185) and even in the field of contract I question whether there is any need in the modern


688 Ibid.


691 Ibid.

692 *Allcard v Skinner* (1887) 36 ChD 145 CA, at 185.
law to erect a general principle of relief against inequality of bargaining power. Parliament has undertaken the task - and it is essentially a legislative task - of enacting such restrictions upon freedom of contract as are in its judgment necessary to relieve against the mischief: for example, the hire-purchase and consumer protection legislation … I doubt whether the courts should assume the burden of formulating further restrictions.”

The foregoing is an important extract for a number of reasons. Firstly, Lord Scarman believes that the doctrine of undue influence already protects those whose decision-making ability could be compromised by the improper actions of others. A doctrine or principle of inequality of bargaining power is not necessary. Secondly, it asserts the view that the law need not interfere into the freedom of parties of contract under whatever terms are negotiated, regardless of the perceived inequality in which the parties may stand. Thirdly, it affirms that in instances where it is of public policy importance that the lesser party is protected from the dominant one in grossly unequal situations, such as in consumer matters, Parliament has enacted specific legislation in this regard, and the role of the courts to interfere further is consequently and necessarily diminished.

5.6. Conclusions

A chapter on duress, in the context of the overall thesis, must look at the different perspectives on what constitutes economic duress. In this chapter, the different perspectives on economic duress have been examined. In particular, a focus has been placed on illegitimate pressure: the nature of the demand, the nature of the pressure, the different forms of illegitimate pressure. This section has also examined how intention plays a role in determining illegitimate pressure. It also looked at what would be considered the norms of an industry; both in terms of the acceptable level of pressure to be considered legitimate, and the degree of fortitude expected to be present in an actor in an industry. A second focus of this chapter has been on the overborne will perspective on duress: especially on the
area of free will - voluntariness, and whether there is ever truly such thing as free will. Bringing those areas together, and considering the practicalities of contract negotiations and renegotiations, as well some relevant cases and leading opinion, it is possible to put forward the idea that duress may be present where there is illegitimate pressure which causes the will to be overborne. Lord Denning attempted to harmonise this area of contract law into a unified theory of inequality of bargaining power, but these efforts have since been largely disregarded. Therefore, at present, a consideration of the determination of duress remains anchored in the domain of the illegitimacy of the pressure and its consequent effect on the alleged victim. Freedom of contract is a vital component of an enforceable contract. Inequality of bargaining power between parties to a contract is a reality of most contract negotiations and renegotiations. Therefore true freedom of contract is an illusion, and the analysis must move beyond the idealist notion of true free will to an analysis of whether free will is impaired beyond what would normally be expected in such circumstances.

It should be noted that this is a changing area of the law, and one where residual uncertainty remains. Brownsword notes that:

“Where a relieving doctrine sets both plaintiff-sided consent or choice related conditions as well as defendant-sided improper conduct conditions, as now seems to be more or less settled in relation to the doctrine of economic duress, then the difficulties are compounded. In an attempt to clarify the improper pressure side of the doctrine, Dyson J [in DSND] says that the factors to be taken into account include: ‘whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract.’ However, only the first two of these five conditions clearly focus on defendant-sided conduct; and, there is already a drift to plaintiff-sided considerations while ostensibly assessing the legitimacy of the pressure applied by the defendant. If the distinction between legitimate and illegitimate pressure is to be clarified, this might be done either by using indicative particular examples (such as a threatened breach of contract, or an illegal act, or
the like), or by resorting to abstract notions such as good faith (as Dyson J does) or reasonableness (as the Privy Council does in R v Attorney-General for England and Wales [2003] UKPC 22). NB, too, Adam Opel GmbH v Mitras Automotive UK Ltd [2007] EWHC 3252 (QB), where David Donaldson QC (sitting as a Deputy High Court Judge) concedes: ‘There is plainly scope for overlap between the three ingredients of pressure, illegitimacy, and causative effect.’”

One gets the distinct impression that there is likely to be further clarification on this in due course in the courts, but for the present, it would seem to be the case that the existence of pressure is assumed to be endemically present, its illegitimacy is to be determined, and its role in inducing the contract must be demonstrated. This is in an overall environment of inequality of bargaining power, where one party will almost invariably have greater power over the other.

Therefore, and to conclude this chapter, a framework for the determination of duress in construction contract renegotiations is offered: For duress to be present in such circumstances, it is proposed here that there must first be a qualified negative effect on the victim’s free will. This reduction in free will must be beyond the reduction which might reasonably be expected in robust negotiations in the construction industry or sector of the industry, and in the context that there is never true equality of bargaining power or true free will, and is evidenced by the lack of alternatives open to the victim. Additionally, the negative effect on the victim’s free will must be caused by the application of illegitimate pressure (other than unlawful pressure), which is a form of pressure considered to be an inappropriate level of pressure beyond that which would be expected within the construction industry in such renegotiation situations. Illegitimate pressure is present if it can be shown to be caused by the abuse (and not merely the use) of a power imbalance resulting in undue influence causing the exploitation of the victim: the taking of unjust advantage of the victim, again as defined by the norms of the industry and the circumstances.693 Therefore, unless this undue...

693 See also Roger Halson, ‘Opportunism, economic duress and contract modifications,’ (1991) 107 LQR 649-678.
influence can be proven, duress will not be present, and the contract should not be consequently vitiated.
6. Special Treatment in Law for Construction Contracts

6.1. Introduction

The giving of separate treatment to certain classes of contracts is not that unusual in contract law, and there are good arguments for proposing that a difference be applied to certain cases in construction contracts also.

It is not intended here to go into depth on other classifications of contracts, but merely to highlight some of the classes of contract which are treated differently under the law, to briefly explore some of the reasons behind their separate treatment, and to conclude as to whether similar separate treatment may therefore be applicable to construction contracts as a classification of contracts. This analysis is necessarily at outline level only, since its purpose is to establish firstly that some classes of contract are treated differently, and secondly to identify some of the reasons why this may be the case, so that comparisons with construction contracts may be drawn.

6.2. Contracts which are treated differently

The classifications of contract which are suggested for some brief analysis are employment contracts, insurance contracts, and contracts for the sale of real estate property (or an interest therein). Again, it is stressed that it is not considered necessary in this work to conduct a full analysis of the chosen selection of contract classifications, since the purpose is to inform the analysis of construction contract modifications, rather than to provide a full comparative analysis of contract classifications in general.
6.2.1. Employment contracts

Employment contracts, through employment legislation, are treated differently from the main body of contract law in several ways. For example, employee rights are significantly greater than would be expected under common law. There are rights enshrined by legislation governing, for example, the treatment of employees, the periods of time under which fixed-term contracts can apply, the comparable treatment of fixed-term employees with permanent employees. A likely reason for this is to prevent the exploitation of workers due to a power imbalance between employers and employees. It has been judicially noted that the process of employment contract construction is one that must be “intellectually segregated” from the general law of contract, because of the relation of dependent an employee has. Without ensuring that employees cannot be treated in ways in which society deems inappropriate, an employer could abuse their position of power to hire someone and subject them to various forms of maltreatment. Therefore, it is the power imbalance and the potential for exploitation by unscrupulous employers which is likely to be at the heart of the different treatment of employment contracts. Furthermore, there is an element of good faith involved in employment contracts; in terms of the employer and employees acting in a state of mutual trust and confidence. For the former, this means treating their workers in a fair and reasonable manner; for the latter it entails carrying out the functions expected within the expectations of the employer. This mutuality of obligations is an element of general contract law, but is a necessary element in contracts of employment. The reason for this is described by Brodie:

“It is, of course, true that all bilateral contracts contain mutual obligations. However as presently conceptualised within the law of the employment contract,

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694 Such as Protection of Employees (Fixed-Term Work) Act 2003.


696 See N Cox, V Corbett and D Ryan, Employment Law in Ireland, (Dublin, Clarus 2009).
mutuality of obligation has a more specific meaning which requires a commitment to on-going relations.” 697

A similar type of good faith exists in construction contracts, whereby both parties are expected to enter into the contract in good faith and use their best endeavours to conclude the contract in the most effective and expeditious manners.

6.2.2. Insurance contracts

Insurance contracts are based upon a much stronger principle of good faith than employment contracts.698 It is incumbent upon any person applying for an insurance contract to do so in the utmost good faith, and to declare, to the best of their knowledge, the truth about the matter (person’s health, property condition, etc) for which insurance is sought.699

“Insurance law imposes a pre-contractual duty upon the assured to disclose to the insurer all material facts, breach of that duty entitling the insurer to avoid the policy.” 700

It is not the insurer’s responsibility to do so, since it would be almost impossible for them to satisfy themselves that the potential insured person was being fully forthcoming about the matter at hand. Therefore, insurance contracts require, as a fundamental principle, that the insured party discloses all relevant information at the time of proposal, so that the insuring party can apply the relevant actuarial principles to calculate the premiums based on the risk, as understood at the time of proposal. If it later transpires that the insured party was not entirely


forthcoming with information at that time, then the insuring party is relieved of liability. Such is the information asymmetry between the insured and the insurer, that placing the burden of reconciling that asymmetry would result in intolerable risks which would, of course, be ultimately passed onto insured parties, resulting in risk premiums which would be most likely unaffordable to many potential insured parties.

This is yet another example of the principles of risk management which were discussed in Chapter 3, where the party best able to bear the risk should manage it. It would be impossible for insurers to bear all risks - known and unknown - so a form of allocation, based on good faith is necessary. If a risk is declared, it can be priced for; if not, it is not priced for; but the insurance industry cannot exist if it is carrying unknown risk. Therefore, the reason for the different treatment of insurance contracts is the understanding of and the optimal distribution of risk. Furthermore, the extent to which the principles of the pre-contractual duties of misrepresentation, non-disclosure and utmost good faith are actually used in practice by insurers varies. For example, a person’s life assurance premium is determined to large extent by statistically data regarding his age and demographic profile. This is even more true of the car insurance industry, whereby age and (until recently) gender statistical data played a very important role in the actuarial calculations; rather than “disclosure” aspects such as, for example, a temperament for safe driving, or a declared history of driving below the speed limit. Given that insurers tend to increase this reliance on statistical data, and the consequent reduction in the pre-contractual duties, this raises the issue that one of the parties (the insurer) takes positive steps to remedy the information mismatch that exists by default between the two parties. The same could be said of the construction industry, whereby specific construction contracts have evolved to deal with the risks which are unique to this industry; reflective of the long-term relational contract between two parties, where the risks identified at the outset of the project do not reflect the true reality of the risks as they materialise on the project itself.
6.2.3. Contracts for the Sale of Land or an Interest Therein

Contracts for the sale of land or an interest therein are the exception to normal contract procedures which do not necessarily require a contract to be reduced to writing. In general, verbal contracts, correctly formed, are enforceable, save for contracts involving the sale of real estate property. The gravity of contracts involving sale of property is such that the law considers that only when the parties go to the trouble of reducing this agreement to writing will it enforce such an agreement. This is a curious anomaly, especially when one considers the evidentiary and formalising function of consideration itself, however it is arguably an additional “cooling off” step for a transaction which for many people is a major life event involving their greatest asset and many years of significant financial implications.

Ní Shúilleabháin proposes four specific reasons as to why formality of contracting for the sale of land is justified: preventing perjury/fabricated evidence as to the existence of a contract; promoting certainty/avoiding litigation; protecting consumers/vulnerable parties; and protecting vested property rights. On the other hand, the counter-arguments for this proposal, and the costs of formal requirements are offered. In particular, the issue of undermining the sanctity of the bargain is highlighted. Were contracts to only be enforceable if in writing, this could have the unfortunate consequence of “freeing a person from a contractual obligation voluntarily assumed.” It is conceivable that a situation could arise whereby “a defendant could rely on a lack of written evidence and

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701 See, for example, UK Government, Law of Property Act 1925 Part II - Contracts, Conveyances and other Instruments, s.53: “Instruments required to be in writing. (1) Subject to the provision hereinafter contained with respect to the creation of interests in land by parol - (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law…”


703 Ibid.
escape a contract even in circumstances where it was quite clear that the contract did exist.” A second key issue emerging in that scenario is the resultant lack of legal certainty and the resultant litigation. For example, such a requirement could result in the frequently-observed situation where the question as to the level of detail which the document should contain arises: should it refer to all the essential terms of the agreement, or is it sufficient that the refers to the existence of the contract? A conclusion regarding the sale of contracts for land or an interest therein is that the requirement for these contracts to be reduced to writing is necessary, for reasons of the significant cost of land, the fact that it is a permanent and limited commodity, and the fact that land transactions tend to be carefully planned.704

It is now necessary to ascertain whether conclusions relevant to construction contracts can be drawn from the above brief analysis. The themes identified in the selected contract classifications include power imbalance and potential for unscrupulous behaviour (employment contracts), optimal risk allocation (insurance contracts), and the gravity of the transaction (property contracts). What, if any, of these features are exemplified by construction contracts?

6.3. Applicability to Irish construction contracts

Power imbalance:

Nature of the imbalance

Construction contracts often have a power imbalance, and any power imbalance raises the possibility of unscrupulous behaviour. As mentioned in previous sections, there may be situations where contractors will tender at artificially-low prices in order to win contracts, then seek to renegotiate once the contract is under way.

How could construction benefit from separate treatment in this manner?

It could be argued that the current situation, whereby a contract modification is not enforceable unless fresh consideration is provided, protects against this imbalance and any subsequent unscrupulous behaviour. However this may not always be the case. In situations where, as is now the case, practical benefit can be construed as constituting good consideration, there is, in effect, little to prevent such activities by the unscrupulous, unless the other party proves the presence of duress. Since it is relatively easy to demonstrate that there is good consideration in this context, it becomes consequently more difficult to demonstrate that this “good consideration” was part of a modified agreement which should be vitiating by the presence of duress. It is argued that it might be better for the consideration issue not to cloud the matter at all, and for the full discussion to surround the question of duress. In this way, any contractor who forces a revised agreement as a result of unscrupulous behaviour will be challenged to defend against a claim of duress, which as per Chapter 5, ought to be a simplified examination of this matter, and should therefore deter the unscrupulous from such behaviour in the future.

Optimal risk allocation:

Nature of risk allocation

This matter has been discussed at length in Chapter 3, but suffice it to say here that risk allocation is one of the key issues in construction contracts - in terms of which party is allocated which risk, and the optimising of the distribution of risk between the employing and contracting parties. An asymmetry of information also exists in construction contracts, much as with insurance contracts, and despite attempts to allocate to the party best able to bear the risk is it materialises, it is often transferred to the contractor as a matter of course. Naturally, this is not optimal in terms of the pricing of risk and the ultimate cost of bearing the risk if it eventuates. So the insurance industry only accepts those risks which it can fully understand and price at the outset, based on full disclosure of information,
whereas construction contracting organisation can be expected to accept many risks which it can neither understand nor properly price for.

How could construction benefit from separate treatment in this manner?
It is unlikely that a construction project will ever be completely free from risk, or that all risks could be fully understood by all parties at the outset. Therefore, the position of the insurance industry of only accepting the explicit risks stated in the contract documentation is unlikely to be completely realised in construction. However, what construction could benefit from, is a mechanism which accepts that there will be risks which materialise which cannot be fully understood at the start of a contract, and which allows modifications to be made to the contract in a straightforward manner, which acknowledges and respects the commercial agreement between the parties, yet protects against unscrupulous behaviour.

Preventing fabricated evidence, promoting certainty, protecting vulnerable parties:
Nature of the characteristics
Three of these reasons proposed by Ní Shúilleabháin705 constitute good reasons for construction contract to also be treated similarly separately, and in a written manner only: written construction contracts remove the possibility of the courts being persuaded on the basis of perjured oral evidence that a contract was entered into when there was no contract; they make it certain that the parties will not be bound by a legally-enforceable obligation until they have given their formal consent to be so bound; and they reduce the possibility of unconscionable bargains.

How could construction benefit from separate treatment in this manner?
The reasons identified as necessitating separate treatment for contracts relating to the sale of land or an interest therein (the significant cost of land, the fact that it is

a permanent and limited commodity, and the fact that land transactions tend to be carefully planned) are very similar factors which pertain to many construction projects. However, what must be important for Irish construction contracts is to ensure that the contracts prevent fabricated evidence as to their existence, promote certainty, and protect the vulnerable, but, simultaneously allow the fluidity that is a necessary reflection of the complex risk profile of construction projects. There is therefore a building argument to ensure that Irish construction contracts are in writing, but that variations to said contracts are enforceable if orally-made.

It has been shown earlier in this thesis that the Irish construction industry is already treated differently by law. Furthermore, it has been shown that the Irish construction industry has some uniqueness when it comes to the construction of one-off housing, and that this exacerbates the problems presented by Williams v Roffey Brothers and Nicholls (Contractors) Ltd. The fact that the Construction Contracts Act 2013 specifically excludes most of what would be considered one-off housing, means that the industry is already statutorily divided into a number of classifications. These are housing (self-build, below 20m square metres); all other works (public and private); and public works on their own.

Despite and because of the foregoing, it can be determined that the construction industry has some similarities with some industries which are given separate treatment by the law, and although the proposal of this thesis is not putting forward changes which would be relevant to all of the reasons that the other industries mentioned are given separate treatment, the case is made that construction; by virtue of its nature, importance, requirement for ongoing change, and in a commercial context; is sufficiently different as to warrant some separate treatment in very limited circumstances. As discussed in the Chapter 2, the


construction industry is of significant importance for any developed economy’s health. A difficulty of this importance is that the industry itself is inherently uncertain one; characterised by risk allocation and consequent disputes, as discussed in Chapter 3. Modifications to construction contracts are required to be made in the same ways as contract formation, despite the fact that the industry’s contracts and projects are prone to dynamic change, often continuously throughout the lifetime of projects over many years, as discussed in Chapter 4. Therefore, it is proposed here that:

**Modifications to construction contracts, made verbally and without fresh consideration, should be enforceable, provided that the original contract was properly formed, and the modification is made in the absence of duress,** (as defined in Chapter 5).

To put this proposal into some context, the current situation of the law can be summarised as follows:

An oral variation to an existing contract is agreed. If the variation is supported by fresh consideration, and there is an absence of duress, it is enforceable; if there is presence of duress, the varied agreement is vitiated. If the variation is not supported by fresh consideration, the presence of reliance is sought, which if found, and absent of duress, means that the original agreement is not enforced where it would be unjust to do so (and hence the varied agreement is enforced). Where the variation is not supported by fresh consideration and there is no element of reliance, then the original agreement is enforced.

This is a rather complex arrangement, requiring a search for the presence of consideration to enforce the variation, any element of reliance in order to estop enforcement of the original agreement, and duress to vitiate the modified contract.
What is proposed in this thesis, for the specific case of variations to the class of construction contracts, is as follows:

An oral variation to an existing contract is agreed, with or without fresh consideration, absent of duress, and is enforced. Where duress is present, the variation is vitiated.

This is a simpler arrangement, where consideration is irrelevant, and hence also the element of reliance, since the issue of promissory estoppel only arises in situations where consideration, when required, is absent. This basic argument is largely consistent with the conclusions of Zhi Xuan Koo,\(^\text{708}\) though what is proposed in this thesis is that the removal of the consideration requirement only applies to the strict cases involving the class of construction contracts, and what is not advocated here is the complete abolition of the doctrine of consideration, which is the central tenet of the aforementioned work. Zhi Xuan Koo meanwhile maintains that consideration should not be required, but that its presence should act as an indicator of intent as opposed to a decisive reason for enforcement, in the context of such a change being resolved by judicial action. However, in the context of the Irish construction industry, and the proposed changes to be made therein, it is noted that the presence of consideration would have no value as such an indicator, since its presence would by statute no longer be required, and all modifications (with or without fresh consideration) would be considered enforceable as a matter of rule. Notwithstanding this, and as discussed in Chapter 4, a valuable function of consideration is its evidentiary role of intent to enter into an agreement (or revised agreement), so it would seem unfortunate to discount its presence entirely. It may well, therefore, be tempting to take its presence into account when determining if duress is present. For example, a claim against a verbally-modified construction for duress might have been less likely to succeed if consideration is present and it is deemed to be an appropriate level of bargain. It

is strongly noted, however, that this is something which the law does not regularly concern itself with; it is the presence of consideration rather than its value which is the factor of determination. Any change to this would not be without difficulty, and this is not a course of action which is recommended in this thesis.

However, it has to be noted that there must be sound reasons for proposing this change to the law. If the law remains unchanged, consideration remains required for variations, and this need for consideration provides an in-built protection against unscrupulous behaviour, since every variation would have to be founded on additional consideration or, failing that, become unenforceable. Surely it is far simpler to leave the law as it stands, rather than changing the law to remove consideration (in certain specific circumstances) and then having to change the understanding of duress, the need for which new understanding is only brought about by the first change (to consideration)? As has been shown in the previous chapters, the consideration requirement for modification to existing construction contracts is non-reflective of commercial efficacy, and has resulted in creating some uncertainty about the enforceability of modified contracts which were agreed under certain circumstances. The proposal of this thesis is then a reflection of the key thinkings in this area, and providing a suitable method for the Irish construction industry. The biggest concern about the creation of a greater emphasis on duress is in circumstances where the weaker employer may become a victim of duress, and then have to successfully demonstrate to the courts that the presence of duress existed. This category of employer is the one most at risk through the introduction of this proposal, especially given that it is here that the greatest opportunity for verbally-made modifications to verbal contracts is likely to occur, due to the level of one-off housing construction in Ireland.
6.4. Conclusions

Accordingly, it is concluded this proposal should not apply to all construction activity in Ireland meeting the above criteria, but should be limited. The appropriate limits proposed are within the confines of the statutory confines already in place in the Irish construction industry: in the private, one-off housing sector, in particular, and being the one sector of construction activity not covered by the Construction Contracts Act 2013. As mentioned above, this is also the area of construction activity where the greatest scope for opportunism by the unscrupulous exists, when it comes to verbally-agreed modifications to construction contracts, and it is where the role of duress will be most pertinent. Therefore, it is put forward here, that the proposal to enforce all verbally-made modifications to construction contracts, where the original contract was properly made in the first place, and where the modification is made absent of duress, specifically exclude the categories of construction activity also excluded by the Construction Contracts Act 2013.

A more refined proposal is therefore that:

Modifications to construction contracts, (with the specific exclusion of the categories of construction activity also excluded by the Construction Contracts Act 2013), made verbally and without fresh consideration, should be enforceable, provided that the original contract was properly formed, and the modification is made in the absence of duress, (as defined in Chapter 5).
7. Theoretical Underpinning of Formalist and Realistic Approaches

7.1. Introduction

On the basis of the nature of the construction industry and the consequent need for fluidity in variations; the nature of the consideration requirements in contract law; and the consequences of the presences of duress in contracts, it is necessary to build upon the outline proposal of the previous chapter before recommending a possible way forward. The essential question which this thesis is asking - is the enforcement of verbally-made modifications to modern construction contracts best served by strict adherence the traditional rules of contract law? - must now be more fully addressed.

It is argued here that this question centres on such issues as to whether construction contract law’s role is to regulate the formal agreement between individuals, or whether it is to do what is the current trend in English courts, particularly in the context of interpretation, which is that it is more concerned with the commercial objective. The consequence of the latter is that construction contract law becomes less concerned with the formalities of contracts and instead focuses on the intension of the parties. This is a fundamental shift in thinking, and, as will be shown, has many implications: both positive and negative. In order to progress this examination, it is necessary to more fully understand the differences between formalist and less-formalist approaches to strict adherence to contract law’s rules.

The logical outcome of the less-formalist approach is that the legal formalities which have been relied upon for so long tend towards irrelevance; and the

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709 Rainy Sky S.A. and others v Kookmin Bank [2011] UKSC 50, which will be discussed later, is a recent UK Supreme Court case which examined the implications of inconsistent contract terms. It encapsulates the latest thinking in the move away from formalist analysis towards an analysis of the commercial objective of the parties.
commercial objectives of the parties become the determining factor. The benefits of this approach are obvious. Such situations are much more easily resolved when the courts are charged with deciding what it is that the parties intended, without the unnecessary cumbersome legal formality and rigidity preventing the commercial objective from being the overriding factor in decisions. It would seem an attractive solution; particularly to those for whom legal interactions are a necessary, but undesirable, aspect to their commercial activity. It places commercial activity and results to the fore, and facilitates the contract as the enabler of commercial activity; which is arguably a main purpose of contracts in society.

Conversely though, this approach removes a degree of certainty which should exist in contracts between parties. The formalist approach offers this clarity and certainty to parties whom have gone to the trouble of correctly construct their contracts. They can, without unreasonableness, expect their contracts to be examined in the context of the legal thoroughness with which they were drafted in the first place. Such certainty enables subcontracts and subservient contracts to be made between the parties and suppliers, for example, and it is this multitude of contracts which society relies upon to function coherently. If a builder did not think his contract with his client would be upheld for want of examination of the commercial objective, he may find it difficult to secure labour, or finance, or credit with suppliers, with the resultant knock-on effects on the many third parties to the original contract who themselves rely on certainty in such primary contracts.

With construction contracts this problem becomes more profound in the context of dealing with modifications to the contracts with regard to how the courts should determine whether the modification should be enforced or not. Since these commercial parties are already in contract in these circumstances, one could argue that the issue could concern less whether the consideration requirement was necessary to establish the seriousness of entering into a commercial agreement,
but more on what it was that was actually agreed and whether one party was left with any other option but to agree to it, drawing from the work of the previous chapter on duress.\textsuperscript{710}

On this basis then, the options available to the courts are to:

a) Examine the contracts from a purely “realist” approach, determining on the basis of the intention of the parties notwithstanding the terms, conditions or relevant doctrines.

b) Examine the contracts from a purely “formalist” approach, and apply a literal interpretation to the terms and conditions, regardless of whether that is consistent with the intentions of the parties.

c) Examine the contracts “realistically”, yet apply a more conservative interpretation to some terms, conditions, or relevant doctrines to ensure that the intention of the parties is aligned with the legal interpretation of the contract.

d) Examine the contracts “formally”, yet apply a more liberal interpretation to some terms, conditions, or relevant doctrines to ensure that the intention of the parties is aligned with the legal interpretation of the contract.

These options will be evaluated and critiqued, and a preference will be proposed. For the purposes of an exposition of the polar opposite positions of formalist versus realist, it is the extremes of these positions which is put across firstly in this work. Naturally, it is expected that to adopt such a fundamentalist approach in either direction would be neither likely nor preferable, though the views are offered by way of highlighting the ultimate position of such a view. Therefore, since the more likely optimum approach, from either perspective, is a

\textsuperscript{710} See Alan Schwartz and Robert E Scott, “Contract Theory and the Limits of Contract Law,” (2003) 113 Yale LJ 541-649, at 566, where this point is further expanded in terms of “ex ante duress” and “ex post duress,” referring to whether the duress occurred at the contract formation stage or at the contract modification stage.
compromise from either extreme, the question then becomes one of whether the preferred approach is more of one or other of the extremes. Hence the necessity to begin with the polar positions.

7.2. The “formalist” and “realist” approaches to supporting commercial intent

The so-called realist approach to the analysis of judicial decision-making is one put forward by Adams and Brownsword. By way of definition, according to these authors, they first lead with the somewhat lengthy, contrasting definition of “formalism”:

“The formalist view gravitates around the rule-book. Its influence can be characterised in the following ways. First and foremost, the rule book governs … Secondly, the rule-book is viewed as a closed logical system. Rule-book exercises are exercises in the logic of the concepts of contract … Thirdly, the conceptual purity and integrity of the rule-book is to be maintained. Formalists are uncomfortable when the encounter ill-fitting or otherwise deviant doctrines. Fourthly, formalism tends towards doctrinal conservatism … If … ‘dangerous’ ideas are to be used, they must be used with caution. Fifthly, … ‘sympathy and politics’ are not material considerations (i.e. for formalist judges - unless, of course the rule-book makes such considerations material). Sixthly, formalism implies an uncritical acceptance, and a mechanical application, of the rule-book doctrines… Formalism takes the idea that ‘Justice is blind’ quite literally: the rule-book is to be applied blind to any consideration of the merits of the case, the purpose or point of the rules, or the context of the dispute. Seventhly, because formalism favours the routine application of the rule-book, it works best with clear general rules which do not involve the exercise of judicial discretion. Of course, the facts have to be found, but once found, general rules promise more or less mechanical application. Finally, it is also possible to view as corollaries of a formalist outlook the tendency to eschew responsibility for major law reform (‘This is best left to Parliament’), and to interpret appeal court jurisdiction narrowly (‘Provided that the trial court

asked the right legal question, and provided that the answer acted upon was not totally unreasonable, then the ruling must stand’.

This extract from Adams and Brownsword also establishes the definition and description of what is referred to as the “antithesis” of formalism: realism. Realism, therefore, is everything that formalism is not. According to Adams and Brownsword, “each of the formalist tendencies [as quoted above] is matched by a realist tendency which pushes in the opposite direction.” Their work is used as the basis for the ensuing part of this section.712

Firstly, where formalism revolves around the rule-book and the rigid application of rules, for realism, the rule-book is not decisive. “The most important aspects of a dispute are the facts and the decision; rules are a secondary consideration.” The contrast is made that if formalism is rules-based, then realism is results-oriented. This is a view supported by Mulcahy,713 where it is claimed that the common law increasingly has tensions between these two competing judicial philosophies. Formalism is interested in the strict application of rules; realism is concerned with the results and the outcomes of the individual dispute. While it is probably a simplistic notion to claim that disputes are viewed either strictly using a formalism lens or a realism lens, that in reality decision-makers lie somewhere between these two extremes. As Mulachy714 puts it:

“Out of a number of possible stances along the continuum between these two position, a judge may be seen as a strict adherent to the ‘paper rules’ (a textural formalism) at the expense of justice or commercial convenience. Alternatively, he or she may be a ‘strong realist’, even an iconoclast, like Lord Denning, for whom precedent is no bar to achieving the right result.”


714 Ibid, at pp.33-34.
Secondly, where formalism is a logical application of the rule-book concepts, to realism, this is by no means an absolute requirement, and the rules as they are generally understood, may not be required to be met.

Thirdly, where formalism concerns itself with the maintenance of conceptual purity and integrity of the rule-book, realism is not so concerned. Realists “do not view blotting the rulebook as the ultimate sin.” Realists do not consider it inappropriate to use or create devices to serve the intended purposes, and view the achievement of a solution as a result, even if the route to that solution is somewhat “spatchcock.”

Fourthly, where formalism tends towards doctrinal conservatism, the realist approach tends towards doctrinal and conceptual innovation. New doctrinal seeds, such as economic duress, promissory estoppel, are to be encouraged, since it is only through innovation and creativity that a system evolves to meet changing societal circumstances. These new doctrinal seeds are not discouraged simply because it is at present unclear as to how they may grow and develop.

Fifthly, where formalist judges are not overly-concerned with sympathy and politics, they matter to realist judges. “It is all very well complaining that hard cases make bad law; but if judges ignore the obvious merits of a case, practical justice goes by the board and the law is rightly accused of being an ass.” Under the realism approach, judges are charged with the greater civic responsibility of assessing doctrinal rules and advocating their change if necessary, rather than simply adopting the contrary role of custodians of the rule-book.

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716 Ibid, at p.183.
Sixthly, where formalism implies an uncritical acceptance, and a mechanical application, of the rule-book doctrines, and that justice is blind; for the realist, this just will not do. When the intended purpose of rules no longer achieves that purpose, then it is time to question the very existence of the rule rather than merely continuing to blindly apply it across the board.

Seventhly, for the realist, discretion is the key-word. Realist judges do not wish to be bound to the strict application of general rules, and are not concerned with a rule-book which contains discretions.

Finally, where the formalist will interpret appeals narrowly in terms of whether the trial court applied the right rules, (“Provided that the trial court asked the right legal question, and provided that the answer acted upon was not totally unreasonable, then the ruling must stand”), the realist appeal judge will assess the result handed down, and will feel free to overturn decisions which they have adjudged to have arrived at the wrong result, rather than just the route to the result.

7.3. Benefits of the “realist” approach

The benefits to this approach are both obvious and subtle. The obvious positive aspect of this is that cases are adjudged on their pragmatism rather than their conceptual purity. The judicial decision is centred about the correct decision based on commercial intent (when we consider commercial contracts) or other practical matters, as opposed to the necessity to maintain a strict adherence to what may be viewed as archaic, anachronistic rules which have lesser application to modern society’s needs and commercial modi operandi than in previous times.

A more subtle benefit of this approach is the increased perceived relevance of the law to society. If a judicial decision is made for pragmatic reasons rather than
purely legally conceptual ones, it increases the credibility of the legal system to society. Conversely, failure to do this (and there may be other methods of applying a level of practicality to judicial reasoning, which will be discussed later), is likely to lead to the legal systems becoming disjointed from the society which they are designed to serve.

If we, once again, return to marketplace considerations, and the necessity for reliable and enforceable contracts to create the circumstances required for parties to have the confidence and certainty to enter into those contracts, it is worth asking how realism aids with this objective. As previously mentioned, the regulation of contracts is required for society’s web of contracts to form. What then, is the effect of a purely realist approach to judicial decision making on this requisite characteristic?

“The function of a contract is not simply to facilitate exchange, it is to facilitate competitive exchange.” 717 A good starting point might therefore be to outline the factors which are considered important to the competitive exchange idea of the marketplace. It will subsequently be possible to assess the level to which the realism and formalism approaches enable those factors.

7.4. The four features required to facilitate competitive exchange amongst parties

A market-individual philosophy that contracts exist to facilitate competitive exchange amongst parties, where minimal restrictions exist on parties to contract how they choose, and where the competitive nature of their interactions are considered important to the effective running of the market place, requires that

the following four features are present, (developed from Adams and Brownsword).\textsuperscript{718}

\textbf{a) Security of transaction:}
Firstly, security of transaction is to be supported and upheld. A party entering into a valid agreement should be able to rely on that agreement being upheld. This, again, ties back to the requirement for potential contractors to have faith in the contract structure in order to conduct their business, and the business which underlies the structure of commercial societies.

\textbf{b) Certainty:}
Parties entering into contracts ought to know where they stand. There should be sufficient clarity for the parties as to the obligations and expectations, how they are likely to be treated, or how their contract is likely to be viewed, in the context of a dispute at some point before the completion of the contract. For this, a set of clear and unambiguous rules is needed, in order to create a degree of certainty as to how these rules will be applied under normal circumstances.

\textbf{c) Commercial intent primacy:}
Since the purpose of contracts is to facilitate commercial exchange, rather than commercial exchange facilitating contracts; the law should support commercial activity rather than the other way around. The guiding principle here is that where the commercial intention of the parties is at odds with the strict legal interpretation, then the intention of the parties should be granted primacy.

\textbf{d) Facilitation of market dealing:}
Since the very purpose of commercial contracts is to facilitate market dealing, it should be the case that ingredients which together comprise a valid contract

should be convenient to those engaged in commercial practice. The example is given in Adams and Brownsword of the rules concerning formation, such as those determining whether a display of goods is an offer or an invitation to treat, simply hinge on convenience, since “[c]ontract is concerned to avoid market inconvenience.”

7.5. Comparison of the consistency of the formalist and realist views on the four features

The purely realist and purely formalist views will now be examined in the context of examining how they are consistent with the above features. The features will be examined from the viewpoints of how the formalist approach and realist approach both support and undermine each feature, and an open-ended conclusion is reached on each of these discussion points. These conclusions then form the basis for the ensuing discussion on the quest for a “middle ground approach” which fulfills the needs of commercial activity while maintaining the correct balance of legal certainty.

7.5.1. Security of transaction

Fundamentally, this is about how much parties to a contract can rely on their agreement being upheld. Since most commercial transactions are entered into by parties who intend to conduct commercial business with each other, it is not an utterly unreasonable position that, if a dispute arises, the decision should rest on what it was that the parties intended to agree upon. The recent case of Rainy Sky v Kookmin Bank is interesting in this regard, where the decision to decide on


the interpretation of (albeit ambiguous) contract terms rested on which made
most commercial sense in terms of the intention of the parties.

This is an important case on the recent developments of the interpretation of
contracts in English contract law. In this case, the United Kingdom Supreme
Court confirmed that if the words of a contract have ambiguous meanings, the
court will interpret in a manner which is most aligned with business common
sense.

The case centred on an agreement between Rainy Sky, a shipping company, who
had ordered vessels from Jinse Shipbuilding Co, a South Korean shipbuilder. The
contract between Rainy Sky and Jinse allowed Rainy Sky to rescind the contract
in the event of the occurrence of certain eventualities, (such as delayed delivery,
amongst others). There was also an obligation to return payments to Rainy Sky
(who was to pay in instalments) should Jinse become insolvent prior to
completion of the contract. This feature of the contract required that Jinse put a
bond in place, and it was Kookmin Bank who provided said bond. After the
payment of two interim stage payments by Rainy Sky, Jinse became insolvent,
and Rainy Sky called upon Kookmin Bank to honour the payments they had
made via the performance bond. Kookmin Bank refused to honour the payments,
claiming that the bond did not cover the insolvency of Jinse.

The Commercial Court ruled in a summary judgement that the bond did cover
Jinse’s requirement to repay on insolvency, owing to the construction of the
contract between Kookmin and Rainy Sky. In the subsequent appeal by Kookmin
Bank, the decision of the court of first instance was overturned. In an interesting
comment by Patten LJ at the Court of Appeal, in criticism of the Commercial
Court’s decision, he described the alternative action of taking a different view of
this case as being such to “put us in real danger of substituting our own judgment
of the commerciality of the transaction for that of those who were actually party
to it.”
The Supreme Court appeal by Rainy Sky was allowed. In delivering the judgement, Lord Clarke referred to the 1995 case of *Co-operative Wholesale Society Ltd v National Westminster Bank plc*[^721] and accepted the principle that “where parties have used unambiguous language, the court must apply it”, regardless of how little commercial sense the result may be. However, since there was some ambiguity in this case, it was that ambiguity which provided the mechanism by which to deviate from the sentiment of the Co-operative Wholesale Society. In such cases with ambiguity, Lord Clarke adjudged that the court should choose the interpretation which is “most consistent with business common sense”. By way of supporting this decision, Lord Clarke referred to two extracts from the judgment of *Longmore LJ Barclays Bank plc v HHY Luxembourg SARL*[^722]:

> “The matter does not of course rest because when alternative constructions are available one has to consider which is the more commercially sensible … If a clause is capable of two meanings, as on any view this clause is, it is quite possible that neither meaning will flout common sense. In such circumstances, it is much more appropriate to adopt the more, rather than the less, commercial construction.”

The possible longer term significance of this judgment is synopsised in a pre-publication comment by O’Sullivan[^723] which asserts that the role of the courts is not in the extrication of parties from poor bargains:

> “Where the meaning of contracts is plain, the courts will be cautious in acceding to submissions that it must be construed other than in accordance with its literal meaning in order to avoid a commercially absurd result. However, a recent decision of the Supreme Court [the Rainy Sky case], handed down after this article


was written, suggests that the pendulum may be swinging away from a literal
approach and back towards favouring a ‘commercial’ construction.”

This is certainly an interesting development, since it fundamentally alters the
landscape surrounding the security of transaction and certainty features. Under a
strict formalist approach, it is generally understood that the agreement is fully
supported as per the concluded contract. In this context, parties can fully rely on
the agreement being upheld exactly as concluded. This provides the security of
transaction that such knowledge allows; thus enabling subservient contracts to be
entered into on the strength that the primary contract will be upheld.

The difficulty with this strict approach, however, arises if he intention of the
parties is at odds with the contract, and one party does not wish to be bound
strictly as per contract. For instance, if the external environment has changed
substantially since the conclusion of the contracts, and one party is now no longer
in a position to deliver as per the agreement, should he still be bound by it? A
strict formalist approach would indicate that he should, even though such an
outcome may not be in the best interests of continuing commercial activity.

The realist approach would take a less literal view of the above scenario, and
assess it on the basis of what the parties intended at the time of contract
conclusion, and compare that with what they would be likely to do if they were
negotiating this contract in the changed environment. From this perspective, the
agreement which this approach would advocate may be more reflective of what
the parties actually intended as opposed to a strict legal definition.

Such an approach, while viewable as pragmatic, may well result in a correctly
concluded contract not being upheld if the commercial intent or reality is not in
accordance with the terms of the contract. This removes an amount of the
security of transaction that the contract, as concluded, will be upheld regardless,
and that, just to take the previous example further, simply because the economic
environment has deteriorated, should that enable a party to effectively welsh from a futures contract to commit to the delivery of a product at a confirmed price?

Might a better approach be to acknowledge that parties are free to alter their contract terms by agreement should they so wish, or that remedies may be available for mistakes, and that for the majority of cases, having such security of transaction is what enables the confidence to contract in the first place? This point will be discussed more in a proceeding section where an attempt to find the “middle ground” is made.

7.5.2. Certainty

Certainty is about parties knowing where they stand in terms of obligations and expectations. That principle extends to how parties reasonably expect that their contract is likely to be interpreted by others, based on established legal doctrine.

The formalist approach fully supports this idea, in that parties are absolutely clear in terms of their obligations under the contract, and have a good deal of certainty as to how their contract may be viewed under scrutiny during a dispute. They concluded their contract in strict adherence with the understood procedures, and have a resultant understanding that what they have strictly agreed to will be strictly enforced as they understood it at the time of contract conclusion.

Taking the formalist approach, however, means that ambiguities will be viewed in a strict legal context rather than being based on commercial intent. Therefore this approach, while providing certainty in terms of obligations and expectations, arguably removes the certainty of the completion of the agreed commercial activity, since an ambiguity will not be viewed through the lens of commercial intent; but instead the “letter of the law” as agreed by the parties in the concluded contract.
The realist view, on the other hand, pays limited heed to the strict legal interpretation of the documents, but takes the pragmatic view of assessing, in the case of ambiguities, how a resolution can be achieved which is consistent with the parties’ commercial intentions. While this approach undoubtedly intends to deliver certainty of commercial intent, it does diminish the certainty of obligations of the parties or how their contract could be viewed or interpreted under different circumstances.

The question then arises: is it better to place the importance of commercial intent above that of contractual certainty? Since a variety of mechanisms exist to give a commercially-sound decision on ambiguous matters even under the formalist approach, the removal of certainty for the majority of cases (per realism) is indeed a very high price to pay. Again, this and other areas will be further developed in the subsequent attempt to find the “middle ground”.

### 7.5.3. Commercial intent primacy

This concerns placing the commercial intent of parties above the strict legal interpretation of the contract. In essence, it is about the law supporting commercial activity, rather than *vice versa*.

For the majority of cases, the strict legal interpretation, will deliver the certainty that commercial activity requires, even if this on occasion is at odds with commercial intent. The formalist approach will generally be consistent with the commercial intent, though where the two are in conflict, a strict formalist approach will grant primacy to the strict legal interpretation.

The realist approach, on the other hand, looks at this form the perspective of where the commercial intention of parties is at odds with the strict legal interpretation, the commercial intent of the parties will be granted primacy.
Without doubt, this creates a clear sense amongst contracting parties, that should a difficulty arise, the problem will be considered in the context of what makes most commercial sense to the adjudicating parties. However, with this, the removal of the certainty required for commercial activity renders contracts so unreliable in interpretation, that the commercial intent primacy feature virtually becomes an irrelevance. If contracts are liable to such re-interpretation which places commercial intent as the primary aim, it effectively becomes the governing aspect of contractual disputes, and all other considerations become immaterial. When all other considerations become immaterial, a contract becomes nothing more than a function of what could be re-interpreted as commercial primacy, thus rendering its value to contracting parties not so much as a statement of roles, obligations and terms of trading; but instead a mechanism to facilitate commercial activity only. While this may seem a circular argument, perhaps it is better illustrated by an example.

B agrees to build a shop for R by a certain date, B subsequently is delayed in the completion of the shop by two weeks, R claims for liquidated and ascertained damages from B, but B cannot pay this amount and R claims for breach of contract against B. B asserts that if he is required to pay the damages he will be unable to complete the shop for R and as a result R will not be able to commence trading as expected. The formalist approach will insist that B pays the damages, regardless of the implications. The realist approach will acknowledge that the commercial intent should take primacy, and that this is best fulfilled by B not paying the damages (at least not immediately in any event) and that he can then complete the building and enable R to commence trading. On the surface, it could appear that the realist approach is sensible, and the formalist archaic and counterintuitive. The realist approach has looked at the commercial intent of the parties and the consequent implications. On that basis, it has placed the delivery of the commercial objective to the fore, and enabled the completion of the contractual obligations, while simultaneously disregarding the liquidated and ascertained damages in order to reach this commercial outcome. Why then,
should any contracting party bother including liquidated and ascertained damages as a provision in a contract, if this, or indeed, any clause is likely to be discarded in favour of placing commercial intent to the fore? Furthermore, what certainty has any party got that what they may view as commercial intent will even be considered as the prime commercial intent? In this hypothetical example, is the loss of two weeks’ trading revenue immaterial? Does this ultimately not open up the prospect that parties to a contract will simply disregard completion dates (as an example) in the knowledge that if they can maintain the balance of ensuring commercial intent remains prime, they may never be liable for liquidated and ascertained damages? How does this ensure that the commercial objective is actually the prime deliverable of such contracts?

This raises the question, as to whether the exception should become the rule. If it is actually the reality that the majority of cases are resolved in a manner which is both in accordance with the legal interpretation as well as the commercial intent of the parties, should the system be changed merely to accommodate the exceptions? This becomes a more interesting question when one considers that there are mechanisms available to judges to ensure a commercially-sensible outcome while at the same time not compromising on formal legal principles, even if the legal device used is sometimes unconventional.

7.5.4. Facilitation of market dealing

This feature refers to the convenience of the ingredients which together comprise a valid contract to those engaged in commercial practice.

Applying a formalist approach, it is a very arguable point that there is certainty amongst commercial and legal practitioners as to what components are necessary for a legally valid and enforceable contract, however, it is equally arguable and should be acknowledged that sometimes the formalities necessary for the
completion of a contract are cumbersome and their function not appreciated by those purely interested in commercial activity.

The realist approach places emphasis on creating the environment whereby the procedures necessary for commercial contracts do not hinder the commercial activity itself. This is indeed a noble aim, in that if the environment for commercial activity can be developed which is not unnecessarily encumbered by the impediments which formal legal instruments require, this must be, almost by definition, an enabler of commercial activity and a facilitator of market dealing. However, this does a disservice to the very steps necessary to conclude formal agreements, since these usually exist for more that simply to provide unnecessary impediments to conducting commercial activity. As an example, even the very act of agreeing to consideration in return for something else of value focusses the mind on the fact that this now becomes a legally-enforceable agreement, and that as a result, a party might give added thought to entering this agreement since the full force of the law will now support it.

Contracts should avoid market inconvenience on one hand, but it is vital on the other hand that the rules for contract formation are clear, unambiguous, and generally understood by a wide section of society; and commercial and legal practitioners in particular, in order to achieve consistency. Removal (or merely dilution) of the established requirements for contract could ultimately make it more difficult for parties to correctly contract with each other.

7.6. Benefits of the “formalist” approach

The formalist approach, consequent on the foregoing and by virtue of being the anthesis of the realist approach, primarily provides certainty in contracting. This

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724 Assuming that the other factors necessary for a valid contract are in place.
certainty, which at times may be frustrating to parties, is what gives the law its rigour. Parties to contracts therefore appreciate the gravity of their actions when entering into contracts, since to enter into a contract in the full and certain knowledge that it will be upheld, and interpreted as agreed, is what gives a contract its value in the first place. To remove that certainty is to remove the very levers which assure parties that obligations will be met and that if they fulfill their own obligations, that they other party will be forced to meet theirs. Since construction contracts are, by their very nature, contracts where each party is engaging in the contractual activity for some commercial gain, there is only a limited amount of altruism in the process.

7.7. Criticisms of and conclusions on the “formalist” approach

Much of the criticism surrounding the formalist approach centres on its perceived rigidity and inflexibility to respond to market conditions as presented. It is shown to be a formulaic system which, almost robotically, analyses each situation under strict adherence to the rule-book. Wightman uses a construction example to typify this point:

“Take, for example, the relationship between a main contractor and various subcontractors on a major construction project such as a large bridge. It will be in the self-interest of all the firms for the project to be completed successfully, but this will not happen if every technical breach is pounced upon as an excuse for terminating and claiming damages.”

While this is certainly a valid point, in that a construction project would obviously not benefit from such successive claims, Wightman must be implying that since contractors and subcontractors often tend to come across each other on several projects over their lifetimes, and that being antagonistic in a legalist

manner is unlikely to nurture that relationship, than it would be much better for all if claims did not happen. Without doubt, it would be preferable were such claims not to happen, but when one considers the causes of many claims being related to delay and disruption, it is likely to be a more satisfactory conclusion to reduce and eliminate the causes of delay and disruption, rather than to remove the mechanisms to resolve genuine contractual grievances. In fact, the point could be made that there is enough uncertainty in the very nature of construction activity already without further contractual uncertainty being introduced.

7.8. Criticisms of and conclusions on the “realist” approach

Many of the merits and demerits of the realist approach have been alluded to in the previous section, in terms of how this approach can both facilitate on one hand, yet undermine on the other, the four features required to facilitate competitive exchange amongst parties. It is without doubt that the purpose of the realist approach is intended to link contractual activity with the intended commercial activity. This is indeed a worthy aspiration, since, as mentioned in earlier parts of this work, the absence of commercial activity would have profound implications for society.

The principle causes for concern regarding the realist approach revolve around the removal of certainty for parties. Almost perversely, this is in fact the case since the very beginnings of realism were in response to the nature in which “legal remedies are seen as inflexible, destructive, impractical, unfair, not reflecting commercial practice and difficult to enforce.”

726 The causes of construction disputes are referred to in more detail in Chapter 3, and in particular reference is made to the work of P. Fenn, *Why construction contracts go wrong (or an aetiological approach to construction disputes)*, paper given at a meeting of the Society of Construction Law in Derbyshire on 5th March 2002.

judicial reasoning and philosophy which puts to the background, or least removes from the fore, those aspects of contractual dealing which are considered to be counter to the very purpose of contracting in the first instance: namely the execution of commercial activity, must surely be welcomed. However, as as been outlined previously, the introduction of uncertainty, or more correctly, the removal of certainty, has changed the manner in which parties now view the absoluteness of the terms with which they have contracted.

Furthermore, another, equally problematic phenomenon arises, and is exemplified though an examination of Rainy Sky SA and others v Kookmin Bank. This case has been referred to already in a previous section, and the notable aspects, for the purposes of this analysis, related to the decision to interpret, on behalf of the parties, an ambiguous clause. In his decision, Lord Clarke gave greater weight to the considerations which made the most commercial sense: in effect, determining what the parties intended based on an analytical determination of the business common sense interpretation. However, as Lord Grabiner notes, Lord Clarke was indeed correct to do what he did in this regard, but only so because there was only one business common sense interpretation.

“...It was not, therefore, a case where the court had to speculate. However, the answers will not always be clear, e.g. if there are competing common sense answers, which raises the interesting spectre of two competing interpretations, both of which are grounded in business common sense.”

Lord Grabiner suggests that the solution to this problem may lie in the court’s preference of the construction which had the most support in the contract wording. This potential problem is essentially one which has yet to appear before a court, but it becomes a very difficult prospect for any court to encounter. If it is


729 Lord Grabiner QC, The iterative process of contractual interpretation, (2012) 128 LQR at 62. It is worth noting that Lord Grabiner’s remarks on Rainy Sky in this article are unfortunately limited in their scope as they are appended to the original article by way of a postscript, since the writing of the original article evidently preceded the Rainy Sky developments.
taken, as a realist approach would suggest, that the contractual rigours are compromised for the sake of commercial expediency, further development of the viability of this approach must consider the almost inevitable scenario of how to decide which of more than one commercial common sense outcome is the correct one.

Ultimately this raises much more fundamental conceptual considerations as to where is the optimum point on the formalist-realist continuum. It is possible to conclude that neither an extreme formalist nor an extreme realist position is optimum, so the question becomes one of whether the better position is to be a liberal-conservative or a conservative-liberal. While to be neither a fundamental formalist or a fundamental realist necessarily results in one being somewhere between the two, the question arises as to whether the better approach is to be grounded in formalism and to apply a liberal view on this as required, or to be a realist at heart and to attempt to use elements of formalism on occasions.

7.9 Conclusions on formalism/realism and proposal on the way ahead

The foregoing has established the principle that different philosophies on the treatment of contracts exist; depending on the context. The desirability of such differences is indeed another matter, considering, as discussed, the necessary for commercial certainty in order to provide efficiently-functioning contracts in society. Therefore, on one hand, it can be acknowledged that contractual disputes may be judged according to the strict principles of established contract law, or they may be viewed as to what the parties desired in a commercial sense. The former gives certainty to the contracting parties, but has rigidity which, in a construction contract environment, may not facilitate the efficient execution of construction projects; the latter places the emphasis on the intent of the parties in
terms of their desired commercial goals. We have seen where the courts have attempted to strictly adhere to the traditional rules of contract law in order to give a judgment which reflected the commercial reality, and did so in a controversial manner. Rather than contriving the law in ways in which question the methods adopted by the courts in such circumstances, it is proposed here that the law should treat verbally-made modifications to construction contracts in a separate way, which combines elements of formalism and realism, but is essentially formal in nature. The giving of separate treatment to certain classes of contracts is not that unusual in contract law, as has been discussed in Chapter 6, and in particular the reasons for justifying the separate treatment for Irish construction contract is made there. The outline proposal, made in the previous chapter, therefore affirms the formal approach, yet adopts a realistic outlook.

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732 Modifications to construction contracts, (with the specific exclusion of the categories of construction activity also excluded by the Construction Contracts Act 2013), made verbally and without fresh consideration, should be enforceable, provided that the original contract was properly formed, and the modification is made in the absence of duress, (as defined in Chapter 5).
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8. Proposal Defence, Conclusions & Recommendations

8.1. Defence of proposal

The main arguments in support of the proposal that:

Modifications to construction contracts, (with the specific exclusion of the categories of construction activity also excluded by the Construction Contracts Act 2013), made verbally and without fresh consideration, should be enforceable, provided that the original contract was properly formed, and the modification is made in the absence of duress, (as defined in Chapter 5).

are discussed below:

1. It provides clarity for contracting parties as to what variations to the contract are enforceable, meaning that all variations are enforceable unless there is evidence of duress to vitiate

The proposed situation is simple. Barring the exception outlined above, all modifications agreed between parties to a construction contract are automatically and fully enforceable, regardless of whether or nor fresh consideration is provided. The issue of promissory estoppel evaporates. The law no longer differentiates between those contracts whose modifications were made with fresh consideration, and those without. All are considered equally enforceable. The provisos are that the contract must have been formed correctly in the first place, (i.e., with all the correct formalities and no evidence of duress), and that the modification must have been freely agreed upon by both parties, and it is only vitiable by evidence of duress.\(^\text{733}\) The law assumes that if parties entered into a commercial agreement together, then they accepted that they would modify the contract accordingly (if and as necessary) to reach completion of the contract. There is no requirement for the evidentiary role of consideration or its function as

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an indicator to the courts that there is a promise to be enforced,\footnote{Ann Blair, Norma J Hird, ‘Minding your own business - Williams v Roffey re-visited: consideration re-considered,’ (1996) JBL 254-265, at 261.} since it is now to be assumed that that function was carried out at contract formation, and continues throughout the contract.

The Singapore case of \textit{Gay Choon Ing v Loh Sze Ti Terence Peter and Anor}\footnote{[2009] 2 SLR 332, [2009] SGCA 3.} provides strong additional support for this point, where Phang, JA notes that “[t]he marrow of contractual relationships should be the parties’ intention to create a legal relationship” and that “the doctrine might now be outmoded or even redundant, and that its functions may well be met by more effective alternatives.” It is not proposed here to do anything so radical as abolition of consideration outright, but only to remove its necessity from certain types of construction contract modifications, particularly where the “more effective alternatives” are mechanisms which can be adapted to suit this situation well, “such as duress, undue influence and unconscionability,” in particular.\footnote{Mindy Chen-Wishart, ‘Consideration and Serious Intention,’ (2009) Sing J Legal Stud 434-456, at 437.}

By exempting the one-off housing construction activity from this proposed change, the proposal offers the “best of both worlds” by improving the efficiency and understanding for the majority of cases, yet retaining a safety feature for the minority which is at most risk of exploitation. By adopting this hybrid approach, which the Construction Contracts Act 2013 demonstrates is possible, the commercial side of the industry can evolve in a slightly different direction to the one-off housing side. The fact that the Construction Contracts Act 2013 makes such a distinction also indicates that a further distinction in this regard may not only be possible, but like to be readily understood and accepted by the industry itself.

\footnote{[2009] 2 SLR 332, [2009] SGCA 3.}
\footnote{Mindy Chen-Wishart, ‘Consideration and Serious Intention,’ (2009) Sing J Legal Stud 434-456, at 437.}

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2. It removes the necessity for creative judicial reasoning

The decision in *Williams v Roffey Brothers and Nicholls (Contractors) Ltd*\(^{737}\) has come in for considerable criticism\(^{738}\) (as has already been discussed) due to the attempt made by the court to adhere to the strict legal principle of finding fresh consideration for a modification where there was arguably none. The approach of finding “practical benefit” was the solution, whereby fresh consideration was indeed found, albeit of a controversial nature. The proposed change to eliminate the need to find fresh consideration (as outlined in the previous section) immediately removes the problem encountered in *Williams v Roffey Brothers and Nicholls (Contractors) Ltd*,\(^{739}\) thus keeping such scenarios out of the courts, save for those where the modification may have been procured under duress.

Furthermore, in a commercial context, gratuitous variations may make commercial sense. A party may wish to be bound by a modified agreement to carry out additional work without receiving additional payment in return. That is not to say, of course, that there is no value to this arrangement. Such a situation may provide practical or factual benefit in terms, as described by Ulyatt:

> “Examples of benefits deriving from seemingly gratuitous varying offers include: increased goodwill and enhanced reputation for fairness (both within specific relationships and generally); avoiding the need to breach external contracts; not needing to engage other parties to complete performance; promises for future preferential treatment; and avoiding costly and time-consuming litigation.”\(^{740}\)

All of these examples, if challenged, could struggle to find consideration in the traditional sense, yet it is undoubted that benefits may be realised. Therefore, in

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order to acknowledge that there may be situations, just as in *Williams v. Roffey Brothers and Nicholls (Contractors) Ltd*\(^ {741}\) where non-conventional consideration exists, it is argued that the traditional rules in this regard are not best placed, and the proposal of this thesis does, in some way, normalise this situation by accepting as enforceable all such variations, regardless of the presence of fresh consideration in any sense: practical benefit or otherwise.

3. It enables the development and better use of the doctrine of duress

The proposed clarification to the understanding of duress should apply to all instances of Irish construction contract formation and modification. Unified understandings of what duress means for the various industry sectors and sub-sectors is of benefit to the entire industry and all its actors. To limit the redefinition of the understanding of duress to only those circumstances explicitly covered by the proposed change to the law would be illogical. For instance, it would not make sense that one level of pressure triggers a right to vitiation under duress at formation, yet a different level of pressure (presumably lower) has the same effect when the contract is under renegotiation for modifications. It may make sense that the point at which the boundary between acceptable and unacceptable pressure will vary depending on the project type, scope, value, type of client, etc,\(^ {742}\) but to assert that the same project has two separate “tipping points,” which differ only on whether the parties are agreeing a contract or renegotiating a contract, would be very difficult to objectively define, and hence is not recommended. In any event, the fact that this thesis proposes exempting the group of employers who are most at risk in this regard, means that what is left is much more likely to consist of business-to-business relationships, (particularly since clients on larger projects will generally employ construction professionals to act on their behalf throughout the project). Such relationships would be expected to be better able to bear the commercial pressures typical in


\(^{742}\) This needs to be the subject of a detailed follow-on study (see section 8.5 Recommendations).
construction, and would not necessarily be expected to benefit from a lower threshold of pressure when it comes to modifying the contract than when it was agreed in the first place.

4. **Duress provides better protection against unscrupulous behaviour than consideration**

Very much part of clarifying duress, as per point 3 above, is the reason for actually increasing dependence on it in the first place. Once clarified and once a clearer understanding exists of what specifically defines duress in the Irish construction industry; and in particular in relation to the area of modifications to construction contracts, better protection will be offered to the vulnerable against unscrupulous behaviour. At present, duress is not heavily used or relied upon as a method for vitiating contracts; instead the test is for enforcement as demonstrated by the presence of consideration. Of course, and as has been mentioned previously, the mere presence of consideration (which does not have to be a fair price, but only of some economic value) does not prevent opportunism in and of itself. The unwitting may agree, under duress, to pay a contractor €1,000,000 for a tiny increase in the scope of the project. Consideration exists, yet it would be unjust to allow such a modification to be enforceable given the presence of duress. However, since duress is not widely used by the courts under such circumstances, it would be very difficult for the victim to prove the presence of duress, in order to have the modification vitiated. After all, consideration is present. The proposal herein is about making duress more accessible, so that any modification to construction contracts, with or without consideration are equally enforceable, but as a corollary, are equally subject to vitiation under a newer, clearer, and more readily-utilised understanding of the doctrine of duress.
The arguments against the proposal are:

1. Without fresh consideration, there is no evidence that both parties agreed to the modification

A key purpose of consideration, as has already been discussed, is to provide evidence that the parties wish to be bound by their agreement (or varied agreement). That the law does not care about the sufficiency of this consideration, and it demonstrates its function as provided a seal, or an extra step to be taken, before the contract becomes enforceable.

The absence of consideration, in verbal contract modification situations, raises the concern that without this “seal” or further indication of the intention to agree, there is less evidence that the parties actually agreed to the modification. However, in practical terms, this difficulty is no more (or no less) complicated than where a verbal agreement to vary (conventionally, with consideration) was alleged to have been made, and one party later disputes that the agreement was actually concluded. Therefore, this is a moot point in many respects.

2. It becomes more difficult to prevent opportunism

A primary criticism (which is tied into the next criticism - duress) of the proposed approach is that it opens up an area of opportunism for the unscrupulous. For example, it is not difficult to imagine, in a construction context, a contractor who successfully tenders for a contract with an unrealistically-low price, only to later seek more money to complete.

Defence against such scenarios rests with duress. As concluded and proposed in Chapter 5, a clear understanding of duress is required in order to determine its presence in such situations. While the unscrupulous contractor may secure agreement from his employer to complete the construction project for more than

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the agreed contract price, an analysis, using this thesis’ proposed clarification\textsuperscript{744} on duress (as it applies to construction contracts), should determine that such a modification will be found to have reduced the victim’s free will beyond the reasonable expectations of the industry, reduced (rather than increased) the options available to the victim, resulting in the taking of unfair advantage of the victim, thus demonstrating the duress was present and the modification consequently vitiated. The unscrupulous, becoming aware that this analysis applies, will find it more difficult to secure valid agreement for demanding more money to complete that which was originally agreed, and the industry should re-adjust accordingly.

Importantly, the exclusion to the proposed rule (ie, for one-off housing, as per the Construction Contracts Act 2013), provides strong protection for the contractually-weak against unscrupulous behaviour by the opportunists. Those fixed with the intent of taking advantage of those perceived as more vulnerable, will not be subject to the proposed rule, and therefore, those with mal-intention must, if they so wish, direct their opportunistic behaviour towards those better able to resist.

3. The only way to vitiate a modification is to prove duress, which places greater emphasis on this doctrine

Since all modifications are automatically enforceable, the only measure open to vitiate is through the demonstration of the presence of duress. Therefore, it is no

\textsuperscript{744} See Conclusions of Chapter 5, repeated here for clarity: “For duress to be present in such circumstances, it is proposed here that there must first be a qualified negative effect on the victim’s free will. This reduction in free will must be beyond the reduction which might reasonably be expected in robust negotiations in the construction industry or sector of the industry, and in the context that there is never true equality of bargaining power or true free will, and is evidenced by the lack of alternatives open to the victim. Additionally, the negative effect on the victim’s free will must be caused by the application of illegitimate pressure (other than unlawful pressure), which is a form of pressure considered to be an inappropriate level of pressure beyond that which would be expected within the construction industry in such renegotiation situations. Illegitimate pressure is present if it can be shown to be caused by the abuse (and not merely the use) of a power imbalance resulting in undue influence causing the exploitation of the victim; the taking of unjust advantage of the victim, again as defined by the norms of the industry and the circumstances. Therefore, unless this undue influence can be proven, duress will not be present, and the contract should not be consequently vitiated.”
longer the case that an unjustly-modified contract falls for want of consideration. That modification is now assumed to be enforceable, and it is up to the alleged victim to demonstrate that the modification was procured via duress. As preciously discussed in Chapter 5, duress is a complex doctrine, is one whose presence the courts are not prone to accepting readily, and economic duress in it present form is “somewhat underdeveloped.” Notwithstanding this, an important part of this thesis’ proposal involves the clarification of duress such that it becomes a more definitive test of its presence, which in turn makes it a more acceptable doctrine for the courts to rely upon. Furthermore, although duress is claimed to be a doctrine with “failings,” it must be noted that the proposal of this thesis is based on the clarification of duress only in construction contract modification cases proposed by Chapter 5. Accordingly, it is held here that, in this strict context of construction contract modifications, it is possible to refine the doctrine of duress to such an extent that it becomes an effective vitiation measure for those modifications which should not be enforceable.

Associated with this is that the presence of duress continues to be a vitiating factor; regardless of whether or not consideration is required. The current situation whereby a contract modification with fresh consideration is examinable under the lens of duress; and its presence vitiates. The proposed solution alters the situation only in as far as consideration is no longer required under certain circumstances. The test for duress remains, though greater emphasis is accordingly placed upon it, since it becomes the bulwark against the unscrupulous. The redefinition of the understanding of duress, also proposed in this thesis, will therefore benefit all circumstances of construction contract formation and modification. The proposal herein, that consideration no longer be required under certain circumstances, is therefore presumptive of duress, and as a

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746 Craig Ulyatt, ‘The Demise of Consideration for Contract Variations,’ (2003) 9 AuckULRev 1386-1397, at 1397, in the context that to remove the consideration requirement for all contract modifications is unfortunate, since the consequent reliance on duress is not a positive move, according to that author.
result, the understanding of this doctrine must be clarified. Unless the qualifier exists, (that there must be no presence of duress), it could prove impossible to prevent any and all construction contract modifications from being enforceable, which is a situation which would not be desirable. In the same way as the courts are not interested in enforcing gratuitous agreements, a situation whereby all modifications to construction contracts would be enforceable without qualification, would be undesirable. Duress, therefore, provides the necessary and appropriate control valve, preventing those agreement which were secured under inappropriate conditions from remaining enforceable.

4. **Williams v. Roffey Brothers and Nicholls (Contractors) Ltd**[^1] was not creative judicial reasoning, and forms a sound basis for such decisions

Although the decision lowered the standard of what was required to constitute consideration[^2], this is in keeping with some moves to do so, and the resultant finding of “practical benefit” merely reflects the reality that there was fresh consideration. Having certainty of an outcome which was already contracted for is certainly of some value:

> “It is an error of fact to suppose that one gets no benefit when he gets only that to which he had an existing right. A bird in the hand is worth much more than a bird in the bush: and that is why the promisor bargains to pay more in order to get it.”[^3]

A problem with this approach, and as discussed in Chapter 3, is that it is then difficult to see how any modification to an existing contract could not be capable of providing fresh consideration in this sense. While logically this may be


[^2]: Craig Ulyatt, ‘Consideration in Contractual Variation,’(2000) 9 AuckULRev 883-911, at 887: “The decision purports to required a much lower standard of only “factual” or “practical” benefit to constitute consideration despite the traditional view that such benefits are worthless in law.”

correct, and there is no doubt as to the value of the “bird in the hand,” it can at least be concluded that this is a difficult area of the law to enter into; especially if it is unnecessary should such modifications not require fresh consideration, as proposed.\footnote{750}

5. Rescission of contract avoids the need for consideration in variation cases

This argument is that, in most cases of contract variation, it is possible to assert that the original contract has been rescinded, and that the varied contract is, in fact, a new contract:

“On this analysis the original contract is mutually rescinded. This rescission is enforceable as it is supported by consideration found in the mutual promise to abandon rights under the previous contract. Therefore the variation is in fact a new agreement (with consideration applied).”\footnote{751}

This approach has been applied in \textit{Williams v Moss Empires Ltd},\footnote{752} where it was noted by the Sankey J that:

“[S]ome confusion has arisen from the words ‘variation of contract.’ The result of varying the terms of an existing contract is to produce, not the original contract with a variation, but a new and different contract.”\footnote{753}

This argument that rescission avoids the need for consideration would appear to be contrived at best, since it assumes that it is representative of what actually

\footnote{750}{See also Karen N Scott, ‘From Sailors to Fisherman: Contractual Variation and the Abolition of the Pre-existing Duty Rule in New Zealand,’ (2005) 11 Canterbury L Rev 201-219.}

\footnote{751}{Craig Ulyatt, ‘Consideration in Contractual Variation,’ (2000) 9 AuckULRev 883-911, at 897.}

\footnote{752}{[1915] 3 KB 242.}

\footnote{753}{Ibid. at 247-8.}
happened\textsuperscript{754} - that the original contract had actually been abandoned and a new contract entered into:

“However, there would need to have been a moment in time where both parties were released from all obligations. To this end the analysis is often strained and unrealistic. Moreover, unless all variations are cast as rescissions, the argument creates practical difficulties in distinguishing between rescissions and variations.”\textsuperscript{755}

6. A reliance-based approach is more appropriate

This argument holds that it is better to assess, from a reliance perspective, whether the modification was relied upon, and whether it would now be unjust to enforce the original agreement, than to automatically enforce the agreement except in situations of duress. This view is not without its critics; notably Atiyah, who was cited in Chapter 4, referring to promissory estoppel in the following terms:

“These two cases strengthen my conviction that the whole doctrine of promissory estoppel is an unnecessary complication which could be expelled from the law without loss. To deny that there is any consideration for a promise, and at the same time to invent a new doctrine to enable the promisee to enforce the promise, seems futile and cumbersome … But to hold that there is consideration, and even then to invent a new doctrine to justify enforcing the promise, borders on the ridiculous. Surely there could be no better case for the use of Occam’s razor.”\textsuperscript{756}

However, the point to be made here is that if consideration is present, it forms a reason to enforce a modification to a contract, and if it is absent, then the courts look to see if there is any reason why it would be unjust to insist on the enforcement of the original contract. In this way consideration is not necessary

\textsuperscript{754} Cf. Raggow v Scougall and Co (1915) 31 TLR 564.


as such, but is merely a reason for the enforcement of the contractual modification. Estoppel provides the counterbalance if consideration is absent, and protects against the insistence of the enforcement of the original contract if the agreed varied contract has been relied upon.

It is noted by England and Rafferty that the usage of promissory estoppel is on the rise, and that it is a doctrine which may well address the deficiencies of the traditional consideration approach to enforcing variations:

“[This is] highlighted by judicial willingness to find some further nominal consideration and by the increasing use of promissory estoppel as a protective device for parties who act in reasonable reliance upon a variation being binding.”\(^{757}\)

The foregoing indeed make sense in some ways, though again, it does complicate rather than simplify. Consideration, if present, is good enough to enforce the variation, but its absence is not fatal to the varied contract. A difficulty with this approach is that it creates further uncertainty, and in an environment where uncertainty causes inappropriate risk allocation, which in turn increases the inefficiency of the industry. Consideration is not always required. Furthermore, estoppel currently only prevents the enforcement of the original contract, and does not enforce the variation.\(^{758}\) If there is no consideration, then the enforcement of the variation rests on the issue of showing reliance on the variation. It is argued here that to remove the consideration requirement for verbally-made modifications to construction contracts, provided that the original contract was properly formed, and the modification is made in the absence

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\(^{758}\) See also Re Tudale Explorations Ltd (1978) 20 OR (2d) 593 (Div Ct) at 597, where Grange J stated that he "could not meet the logic of the distinction between allowing estoppel to be used as a shield and not as a sword where one party is seeking to enforce a modification in an existing contractual relationship."
duress, is a neater and more readily-understood - and hence more applicable - way to proceed.

8.2. For whom does the removal of the consideration requirement (in this context) ultimately benefit?

Before a final conclusion on the validity or otherwise of the proposal of this thesis can be made, it is necessary to assess, should the proposal be adopted, which, if either, of the parties to construction contracts will realise the greater benefit. Does the proposed changed make the employer more powerful, put the contractor in a more advantageous position, or does it affect both parties equally?

In order to analyse this question further, it is necessary to once again consider the relationships which exist in construction contracts. It is established that construction contracts are commercial contracts. This being the case, both parties are engaging in a process which is mutually beneficial. It has been shown in earlier chapters that the work is likely to change over the course of the implementation of the contract, and that the contract may require changes in order to effect the variations which may occur. What is proposed in this thesis is a mechanism to facilitate these changes in a more appropriate manner specifically for the construction industry. The impact of this proposal is now considered from the perspective of both parties to a typical construction contract.

Under the current arrangement, a change which is proposed verbally by either the employer or the contractor must (assuming all other elements of formation are in place) include an element of consideration from both parties. From the contractor’s perspective this is usually in the form of additional or altered construction work; from the employer's perspective, this is usually additional payment.
The Contractor

The proposal means that the contractor will either no longer have to receive a commitment for additional payment for the change to the work for the modification to be enforceable; or he will be able to receive additional payment for doing the same work, if that is what is agreed by the parties. What this means is that the contractor can request additional payment just to complete the work which was already agreed in the original contract, or he can choose to do additional or changed work for no extra payment. Given that the former is the greater risk to the balance of power in such a contractual arrangement, the necessity to protect against unscrupulous behaviour (as already discussed) is provided via duress. A difficulty is that the contractor does not have to prove duress; but merely defend against it, thus arguably increasing its power relative to the employer. The mitigating measure requires that duress become a more generally-accepted means of vitiating such variations, and that as a result, the parties become less likely to attempt unscrupulous behaviour.

The Employer

On the converse side, the employer must now be aware that changes which are verbally agreed to are also binding. The risk to the employer is that the contractor will announce that it cannot complete the works as agreed and requires additional payment to do so. Should this be agreed to, even verbally, then it becomes binding. This risk, which is a primary concern of this proposal, is only mitigated by the client demonstrating that the agreement was made under duress, as outlined in Chapter 5. If unable to convince the courts that this is the case, then the agreement holds. This is a major change, and one which places a new burden on the employer, and which can only be ameliorated if the recommendations for duress proposed in Chapter 5 are accepted for this specific industry. In other words, if duress does not become a more accessible area of the law for ready-recourse against modifications which are the result of unjust modifications, then the balance of power shifts quite significantly towards the contractor, and at the obvious expense of the employer. Excepting one-off
housing from the proposed rule (in line with the Construction Contracts Act 2013) reduces this risk considerably, since those most vulnerable employers are automatically exempted from the rule. The elderly verbally couple agreeing to an upward increase in the cost of their extension are not bound to process duress under such circumstances; their modification continues to be held invalid if verbal and with no fresh consideration.

The Net Effect
The net effect, it is argued here, is that the proposed arrangement reflects commercial reality. If the contractor wishes to agree to alter his plan of works for no additional payment, and to be consequently bound by such an agreement, it is difficult to justify why this should not be permitted. Likewise, if the client is desirous of agreeing to grant additional payment to the contractor for that which was originally promised, and provided that the modified agreement is made for reasons which are absent of duress, why then should this agreement be prevented from being binding? Since greater emphasis is now placed on the somewhat more subjective existence of duress rather than the purely factual presence of consideration, it is likely that parties will adapt their procedures accordingly, however the importance of the courts’ willingness to accept duress as a reason to vitiate modifications where one party took unjust advantage of the other cannot be overstated. Exempting that category of construction as exempted by the Construction Contracts Act 2013, means that the grouping of employers most likely to come foul of unscrupulous behaviour and then having to prove duress, are not at risk, and continue to operate as normal. Knowing that verbal agreements without consideration will be enforceable, it is not unreasonable to assume that verbal agreements will not be made lightly, and in order to become enforceable (or at least non-vitiable) parties will need to act in a manner which demonstrates that they did not act in bad faith with the intent of taking unjust advantage of the other party.
In such a way, it is at least possible that verbally-agreed changes, which are likely to feature on construction projects, may actually occur in a better spirit of cooperation and mutual beneficiality than may currently be the case, since the necessity to ensure the ability to demonstrate the absence of the taking of unjust advantage (which is arguably a definition for acting in good faith) effectively becomes the only prerequisite for enforceable variations in construction contracts, provided all other formation requirements are properly in place.

This proposal provides a balance between improving commercial efficiency on one hand, and preventing opportunism and protecting the exploitable on the other hand. It does so by proposing a change to construction contract law in Ireland regarding the necessity to provide fresh consideration for verbally-made modifications to construction contracts which were properly formed, yet prevents the smaller construction contracts, typified by inexperienced employers, from being the target of unscrupulous behaviour by predatory contractors. It is therefore the considered conclusion of this study that the proposal put forward represents a progressive approach to the modernisation of the law in this regard in Ireland, yet maintains a fair and balanced treatment of the parties involved.

8.3. The proposed solution and the common law

As was referred to in the previous chapter, the common law has developed with regard to formalism versus realism, notably in *Rainy Sky SA and others v Kookmin Bank*.759 The proposal of this thesis requires statutory intervention to put into effect (see Recommendations, later in this chapter), but it could be argued that the common law in *Rainy Sky SA and others v Kookmin Bank*,760 and the general move towards commercial intent in interpretation might serve some

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760 Ibid.
of this purpose, (as discussed in Chapter 7). So, for example, a modification to a construction contract, viewed through the realist lens of commercial intent could, presumably, conclude without too much difficulty, that the modification, which is in the same spirit of the original contract, and both parties clearly wish it to occur, should be enforceable. In fact, such a view may even envisage such changes as part of a long-term, ongoing contract, such as a major construction one. In that sense, why then would statutory intervention be required, such as that proposed by this thesis?

An answer to this lies in the difficulty referred to, in Chapter 7, by Lord Clarke in *Rainy Sky SA and others v Kookmin Bank*,761 whereby a case of ambiguity between two options was judged based on which of the two outcomes was more commercially-beneficial to the parties. It was not, in the words of Lord Clarke, “a case where the court had to speculate.” The court did not have to decide whether an agreement was enforceable, but rather, what of two possibilities was to be enforceable, based on the more likely better option. The latter is one where, undoubtedly, there is merit in seeking to find the more appropriate solution, based on what is the more commercially-expedient and business common sense outcome. The former, however, opens the area as to whether there was a modified agreement in the first place.

As to the net effect in practice of *Rainy Sky SA and others v Kookmin Bank*,762 it is important to note that this case does not represent a dramatic change in courts’ interpretation of contracts, allowing them to re-write contracts by assessing through the lens of commerciality. Instead, the approach developed from this case would, it would seem, begin and be based upon the actual words the parties used in the contract, and where there is unambiguous language, the courts will apply it literally. This case, therefore, is one which centres on the issue of


762 Ibid.
ambiguity, taking the approach of using commercial beneficiality as the indicator of the preferred direction, where two options exist. It is difficult to see how this case could therefore effectively apply where parties disagree that a verbally-made modification to a construction contract exists. This is particularly so if one considers that the courts are not privy to anything which may have been said or done during negotiations between the parties, and accordingly places considerable faith in the ability of judges to understand the commercial context in which the modified agreement operates in order to determine which interpretation aligns with commercial common sense. Furthermore, as was found in *Enterprise Inns Plc v Palmerston Associates Ltd*, *(which was decided shortly after Rainy Sky SA and others v Kookmin Bank,)* a situation whereby there are just the two options is not necessarily that straightforward for the courts to decide upon. *Rainy Sky SA and others v Kookmin Bank* was relative simply in this regard, in that there was only one logical conclusion to make, but should be considered in the light of *Enterprise Inns Plc v Palmerston Associates Ltd*, where there were two possibilities: both of which made business common sense. The decision of the courts was not to choose the one which made the greater business common sense (since such a task was impossible, as both tasks could not be considered more consistent with business sense than the other), so instead the courts preferred the construction which was more consistent with the ordinary meaning of the words used by the parties. Therefore, reliance on a common law approach to even relatively straightforward matters such as which of two possible interpretations better reflect the commercial intent of the parties, is inherently problematic. The issue of such a common law approach as to the existence of a

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763 The latter point was highlighted by Neuberger JK in *Skanska Ashleigh Weatherfoil Ltd v Somerfield Stores Ltd* [2006] EWCA Civ 1732 (at 22).


766 Ibid.

modified agreement would be even further fraught with difficulty. On the basis of the foregoing consideration, this thesis therefore maintains that a legislative, rather than common law (or judicial) approach is the preferred approach for dealing with the matter under examination in this study.

8.4. Conclusions of Study

The primary research question, developed in Chapter 1 asks if the Irish construction industry is sufficiently different as to merit some separate treatment in law, regarding the rules for contract modification, and where such modifications are verbally-made and without fresh consideration. In order to satisfactorily answer this question, a number of premises, introduced in Chapter 1, have had to be shown to be true for the logical argument of the thesis to be inductively sound.

This thesis has demonstrated the importance of an effective construction industry for a functioning, developed society, as discussed in Chapter 2 (Premise 1). Chapter 3 then shows how this industry operates within the contract paradigm which applies to all contracts: great and small, notwithstanding that construction is a complex industry where the risks are never fully understood at the outset, and the complications in terms of delay, disruption and dispute which often ensue, (Premises 2 and 3). The difference between changes under the contract, and changes requiring contract variation is further emphasised at this point as being the area of concern for this thesis, (Premises 4 and 5). The rules for agreeing to modifications to contracts are established at this point, (Premise 5). Chapter 4 describes how one particular component of this contract paradigm which applies, is the consideration requirement for verbally-made modifications to contracts, except where an element of reliance can be shown. The vitiation measures identified include duress, and economic duress in particular, but this has been shown to be a difficult area of the law to objectively test for, as presented in
Chapter 5. A key aspect of the thesis’ work at that point is to define what duress means in the context of the construction industry. With some clarification offered there on the separate treatment of some other classes of contracts, it is possible to put forward and defend the central proposal of this thesis, namely that construction contracts should be treated separately as a class of contracts, such that verbally-agreed modifications to properly-made construction contracts do not require fresh consideration, provided that there is no presence of duress, as per Chapter 5, (Premise 6).

There is good precedent for the separate treatment of certain types of contract under the law, (Premise 7), and as Chapter 6 outlines, this special treatment even includes the Irish construction industry, which is brought out for special treatment in the form of the Construction Contracts Act 2013. Indeed the categories offered by this legislation provide a solid foundation for the proposals made by this thesis, (Premise 8).

Accordingly, and referring back to the Methodology in Chapter 1, since the premises of the argument are true, and the argument itself is sound, it is held that this constitutes an inductively forceful argument with a high degree of rational expectation.

It is thus proposed in this thesis that a way to reconcile the problem outlined above for the construction industry, is that modifications verbally agreed to construction contracts should be enforceable as a matter of right, (with the exception of those not covered by the Construction Contracts Act 2013), provided that the original contract was properly formed in the first instance, and there is no duress present for the modification. What this means, in effect, is that all modifications would automatically be considered to be enforceable, unless it can be shown that the agreement is procured through the use of duress, (again excepting those specifically excluded by the Construction Contracts Act 2013).
The proposal contained in this thesis significantly simplifies the test for enforceability on one hand. With a single stroke, it no longer requires consideration (in whatever manner) to demonstrate that the agreement should be enforced; nor does the presence of promissory estoppel come into the equation, since the agreement is automatically viewed as enforceable. On the other hand however, it raises a significant primary concern over the key means of vitiation: duress. It now becomes necessary for the alleged victim to demonstrate that duress has occurred as the means available to vitiate the agreement which is taken as enforceable. This places a greater reliance on a aspect of the law which the courts have tended to avoid. By way of allaying this concern, the first point to note is that this is not a wholesale proposal. Since other classes of contract have been afforded separate treatment under the law, it is proposed here that construction contracts only are offered this separate treatment in this regard, and furthermore, only those construction contracts also covered by the Construction Contracts Act 2013. The second point follows from the first, since, because it is only construction contracts which this new reliance on duress relates to, it should be possible to define strict limits as to what constitutes duress for this industry. Guidance in this regard is offered in the conclusionary sections of Chapter 5, determining that duress should only be deemed present when on party takes unjust advantage of the other, as deemed so by the norms of the industry. Such a qualified limitation on the definition of duress for construction contracts is likely to be possible.

The significance of this change is not underestimated. It is fully acknowledged that consideration, as a doctrine of contract law, has weathered many storms over several centuries and two millennia, and survived them all. To refer back to Chapter 1, an aim of this study is to investigate the rules for enforcing verbally-made contract variations in Irish construction contracts. What is proposed here is therefore not the abolition of consideration; indeed the doctrine offers much to contract law in general, and what is offered here is intended to ensure that the positive aspects remain, while some of the more limiting aspects, only for the
situation in question, are improved upon. This thesis is therefore merely proposing a limitation on the requirement for consideration for the specific class of contracts dealing with Irish construction contracts (except those excluded under the Construction Contracts Act 2013). This is not a proposal which is made lightly. It is drawn from the preceding research which leads to the conclusion that the inefficiency which plagues the construction industry is not helped by this aspect of contract law; and that this particular aspect could be improved, and only for this specific industry. As discussed in earlier sections of this thesis, construction is an inherently uncertain area of commercial activity, and this proposal has the potential to reduce, maybe only in a small way, but reduce nonetheless, this uncertainty.

8.5. Recommendations

The recommendations of this thesis are therefore as follows:

a) The proposal, that modifications to construction contracts, (with the specific exclusion of the categories of construction activity also excluded by the Construction Contracts Act 2013), made verbally and without fresh consideration, should be enforceable, provided that the original contract was properly formed, and the modification is made in the absence of duress, is adopted. It is argued here that this is an appropriate way to proceed to reduce inefficiency in construction contracts, and to ensure that all parties are fully aware of their obligations when verbally agreeing to a modification to an existing construction contract. Statutory intervention is required in order to effect this recommendation. As mentioned in Chapter 6, and in reference to Singapore, this thesis’ proposal does not require judicial intervention. Judicial intervention may be

appropriate whereby the presence of consideration could act as an indicator as to the intent to agree to the modification; but in this proposal, all modifications are considered enforceable, save for presumption of duress.

Chapter 6 (and also Chapter 2, earlier) outline the possibility to treat certain industries differently under law; and to treat the Irish construction industry specifically so by the enactment of the Construction Contracts Act 2013. The exceptions to the Construction Contracts Act 2013, as discussed already, are appropriate exceptions to this proposed change, and in practical terms, make general understanding of the proposed change easier to understand, since there would be consistency with the Act. For these reasons, statutory intervention to effect the proposal of this thesis, in line with the Construction Contracts Act 2013, is recommended.

b) Progress should be made to make duress a more accessible remedy in the limited circumstances at hand. Further work is required to clarify, for the construction industry, the industry norms in order to determine the boundaries which separate robust renegotiation and the taking of unjust advantage, as discussed in Chapter 5. Once these industry norms are properly defined, it will then become possible for the courts to apply them as the yardstick by which to determine the presence or not of duress in such circumstances.

c) Standard forms of construction contract should explicitly state in their conditions that such modifications, made as per a), will be enforceable. Such an express part of construction contracts will heighten awareness amongst practitioners that a change to the enforceability of verbally-agreed modifications has occurred. In a sense, this becomes the counterpart for the jurisprudence work in the preceding recommendations.
8.6. Limitations of study

It is acknowledged that a study such as this can not be fully conclusive, but can only make judgments based on the data researched using the selected method of research. In this regard, one limitation of this study is that it is exclusively a desk-based piece of research. This has resulted in the data being drawn from desk-based sources only, and without any assessment of the impact of the proposed changes in reality and amongst practitioners. Furthermore, the true extent of the problem caused by the consideration requirement is not quantified.

A follow-on study is therefore suggested, which uses a combination of quantitative data to determine the full extent of the problem identified, and qualitative data to understand full implications of problem and effectiveness of proposal, as well as to begin the process of the establishment of the specific norms of the industry's negotiation/unjust advantage boundaries. It is noted that until those limits are determined, accepted and applied, there will remain further uncertainty, though not as much as at present if the proposed guidance on duress is accepted.

It is also acknowledged that the determination of these limits is unlikely to be a straightforward or simple task. The construction industry, as noted in Chapter 2, is characterised by a very wide variety of project typologies; is involved in delivering assets for various industries; and utilises a wide and varied set of human and physical resources for different projects. Consequently, it is likely that a search for the boundaries between robust renegotiation on one hand, and the taking of unjust advantage on the other hand, is likely to yield different responses depending on the multiplicity of factors at play. A more realistic outcome could be that a simplification occurs, based on a combination of characteristics, such as project type, value and complexity; and a matrix produced as the output, which enables arbiters of disputes to determine, based on the
project characteristics, the likely level of negotiation to be expected before this crosses into the realms of duress.
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